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# Foreign Private Investment in Palestine Revisited: An Analysis of the Revised Palestinian Investment Law

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# FOREIGN PRIVATE INVESTMENT IN PALESTINE REVISITED: AN ANALYSIS OF THE REVISED PALESTINIAN INVESTMENT LAW\*

David P. Fidler\*\*

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## INTRODUCTION

The agreement reached between the Palestinians and Israel, with the assistance of the United States, at Wye Mills, Maryland on October 23, 1998<sup>1</sup> ended the ominous stalemate in the peace process. The Wye

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<sup>1</sup> Wye River Memorandum, Oct. 23, 1998, Isr.-PLO, 37 I.L.M. 1251.

Memorandum moved the peace process into a new phase, filled with new hope and old uncertainties.<sup>2</sup> Violence and protest after the signing of the Wye Memorandum mean that this breakthrough has not brought peace to the Palestinian-Israeli relationship.<sup>3</sup> Many concerns about the peace process still exist.

While fears about the peace process range across a wide variety of problems from settlements to security, the continued lack of economic development in the West Bank and Gaza (the Palestinian Territories) adds to those fears over the health of the peace process. The Wye Memorandum, for example, contains provisions that recognize the importance of Palestinian economic development to the peace process.<sup>4</sup> The lack of Palestinian economic development is not a new concern. The continued economic problems and suffering of the Palestinian people, however, constitute a threat to building a stable relationship between the Palestinians and Israel. One important aspect of the economic dilemmas facing the Palestinians is the lack of significant foreign investment in the Palestinian Territories. Foreign investment has long been considered central to the economic strategy constructed in the Oslo agreements to give Palestinians economic opportunity. In April 1998, the Palestinian National Authority (PNA) passed a revised Law on the Encouragement of Investment in Palestine (Revised Investment Law) to strengthen the legal framework for foreign investment in the Palestinian Territories.<sup>5</sup> This law took effect in May of that same year.

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<sup>2</sup> See AMERICANS FOR PEACE NOW, UNDERSTANDING THE WYE MEMORANDUM 1 (1998) ("The Wye Memorandum has given new hope for the eventual success of the Oslo negotiations.").

<sup>3</sup> See Deborah Sontag, *A Jew, Then an Arab, Killed in the West Bank*, N.Y. TIMES, Oct. 27, 1998, at A14 (reporting on the murder of an Israeli and an Arab in the wake of the Wye Memorandum); Deborah Sontag, *Israeli Jeep Blocks a Bomber from School Bus Carrying 40*, N.Y. TIMES, Oct. 30, 1998, at A1 (reporting on the failed attempt of a Palestinian suicide bomber to destroy a school bus carrying Israeli children).

<sup>4</sup> Wye River Memorandum, *supra* note 1, art. III.

<sup>5</sup> LAW ON THE ENCOURAGEMENT OF INVESTMENT IN PALESTINE, No. 28 (1998) (Palestine), translated by the Palestinian National Authority Ministry of Economy and Trade, [hereinafter REVISED INVESTMENT LAW]. The official English translation of the Revised Investment law is reprinted in the Appendix to this issue of the *Case Western Reserve Journal of International Law*. 31 CASE W. RES. J. INT'L L. 521 (1999). The official translation of the Revised Investment Law is in many places awkward or not clear. I have made, therefore, some minor grammatical, stylistic, and organizational changes to improve the readability of the Appendix. I made no changes that would affect the substance or meaning of the Revised Investment Law.

This Article analyzes the Revised Investment Law and whether it enhances the prospects for foreign investment in the Palestinian Territories. Part I examines the economic development framework established by the Oslo peace agreements and the breakdown of the Oslo strategy for Palestinian economic development. Part II provides a brief history of the Palestinian investment law. Part III analyzes and compares the official English translation of the Revised Investment Law to standards on the treatment of foreign investment found in international documents and treaties. Part III also discusses whether the Revised Investment Law conforms with international standards on foreign investment. Part IV reflects on possible interpretations for the Revised Investment Law's divergence from international standards on foreign investment. Part V offers a few thoughts on the serious problems confronting Palestinian economic development in the near and medium-term future. This Article concludes that, while the Revised Investment Law constitutes a questionable contribution to Palestinian economic development, greater political, legal, economic, and philosophical forces will ultimately determine what contribution the Revised Investment Law makes to the peace process and the future of the Palestinian people.

## I. THE PEACE PROCESS AND PALESTINIAN ECONOMIC DEVELOPMENT

### A. *The Oslo Strategy for Palestinian Economic Development*

Central to the strategy of the Israeli-Palestinian peace process has been the belief that peace depends on Palestinian economic development.<sup>6</sup> As a result, the economic conditions in the Palestinian Territories have long been an important consideration.<sup>7</sup> The importance of Palestinian

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<sup>6</sup> See David P. Fidler, *Foreign Private Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine*, 19 FORDHAM INT'L L.J. 529, 531 (1995) (noting that "[m]any believe that Palestinians who see no improvement in their standard of living or find no economic opportunities as a result of the peace process will question the wisdom of making deals with Israel and perhaps support forces that oppose the peace process"); Odin K. Knudsen, *Beyond the Israeli Election: Bringing Forth a Sustainable Palestinian Economy*, PALESTINE ECON. PULSE, May-June 1996, at 21 (Mr. Knudsen was a former Resident Representative in World Bank's West Bank and Gaza Resident Mission arguing that without economic development "the Palestinians will become more impoverished, breeding more resentment and hostility towards Israel").

<sup>7</sup> See, e.g., 1-6 World Bank, *Developing the Occupied Territories: An Investment in Peace* (1993); Economist Intelligence Unit, *Peace Media 1994: Economic Dimensions of the Middle East Peace Process* (visited Mar. 15, 1999) <<http://www.palecon.org/peacedir/peacemedia94/index.html>>. See also World Bank, *West Bank and Gaza Update* (visited Sept. 9, 1998) <

economic development "explains why experts analyzing the current state of the Palestinian economy are worried about the prospects for the peace process."<sup>8</sup> Those crafting the peace process constructed a specific strategy for Palestinian economic development to ensure that peace included economic opportunities for the Palestinian people.

The Oslo strategy for Palestinian economic development involved four pillars: (1) international aid; (2) continued close Israeli-Palestinian economic relations; (3) foreign investment; and (4) Palestinian access to foreign markets.<sup>9</sup> These elements formed an interdependent and complex approach to Palestinian economic development. International aid was intended to assist the Palestinians in building a modern economic infrastructure that would lay foundations to attract foreign investment. Close economic arrangements between the Palestinians and Israel would, in the short term, give Palestinian labor and goods access to Israeli markets. In the long term, it would allow the Palestinian Territories to integrate into the regional economy. Foreign investment would be attracted by Palestinian access not only to the Israeli market but also to regional and other international markets, as the Palestinian Territories could serve as an export platform. Thus, Palestinian access to other markets besides Israel was critical to the development of the private sector generally and the inflow of foreign investment specifically.

The mechanisms designed to implement this Palestinian economic development strategy were an international aid program, the Protocol on Economic Relations between Israel and the Palestinian Liberation Organization (Economic or Paris Protocol),<sup>10</sup> and the creation of an "enabling environment" of political and legal reforms to promote private sector development in the Palestinian Territories.

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palecon.org/update/index.html> (containing quarterly publications updating the condition of the Palestinian economy); United Nations Office of the Special Coordinator in the Occupied Territories, *UNSCO Report on Economic and Social Conditions in the West Bank and Gaza Strip* (Spring 1998) (visited Sept. 8, 1998) <<http://www.arts.mcgill.ca/mepp/unsco/unqr.html>>.

<sup>8</sup> David P. Fidler, *Peace Through Trade? Developments in Palestinian Trade Law During the Peace Process*, 38 VA. J. INT'L. L. 155, 156 (1998). See discussion *infra* Part I.B (discussing current problems with Palestinian economic development).

<sup>9</sup> See Fidler, *supra* note 8, at 156-57 (describing these four fundamental elements of the Oslo economic strategy for the Palestinian Territories).

<sup>10</sup> Protocol on Economic Relations between the Government of the State of Israel and the P.L.O., Representing the Palestinian People 33 I.L.M. 696 [hereinafter *Economic Protocol*], in *Interim Agreement on the West Bank and Gaza Strip*, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 551, 639 [hereinafter *Oslo II*].

### 1. International Aid Program

Less than a month after the signing of the Declaration of Principles on September 13, 1993,<sup>11</sup> forty-seven countries attended the Conference to Support Middle East Peace and pledged approximately U.S.\$2 billion in aid over a five-year period to support the development of the Palestinian economy and the transition to Palestinian self-rule.<sup>12</sup> Central to this international aid program "was that such aid would be primarily used to build the economic infrastructure necessary to encourage private investment in the Palestinian Territories."<sup>13</sup>

### 2. Economic Protocol

The Economic Protocol established the framework for Palestinian economic relations with Israel and the rest of the world for the interim period. The Economic Protocol laid down the structure for the movement of goods and labor between Israel and the Palestinian Territories and for Palestinian trade with the rest of the world. Essentially, the Economic Protocol created a free trade area between Israel and the Palestinian Territories, a modified customs union based on Israeli customs duties and rules, and the opportunity for the PNA to open foreign markets for Palestinian exports. Under the Economic Protocol, Palestinian goods were to move freely into the Israeli market.<sup>14</sup> Such access to the significant Israeli market "promised to eliminate the discriminatory treatment suffered by Palestinian goods during the period of occupation."<sup>15</sup>

The Economic Protocol did not, however, provide for free movement of labor between Israel and the Palestinian Territories. It merely states that both parties "will attempt to maintain the normality of movement of labor between them," but each determines "the extent and conditions of the labor movement into its area."<sup>16</sup> Israeli control over Palestinian labor flows into Israel, combined with Israel's policy of systematically reduc-

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<sup>11</sup> Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, 32 I.L.M. 1525 [hereinafter Declaration of Principles].

<sup>12</sup> See Fidler, *supra* note 6, at 533-34.

<sup>13</sup> *Id.* at 534 (citing Deborah Zabarenko, *Global Meeting Set to Raise \$2 Billion for Mideast*, Reuters, Oct. 1, 1993, available in LEXIS, Nexis Library, CURNWS File).

<sup>14</sup> See Economic Protocol, *supra* note 10, arts. VIII(1), IX(1). The movement of Palestinian agricultural products is subject to Israeli veterinary and phytosanitary measures and certain quotas to be phased out by 1998. See *id.* art. VIII(2)-(10).

<sup>15</sup> Fidler, *supra* note 8, at 162.

<sup>16</sup> Economic Protocol, *supra* note 10, art. VII(1).

ing the level of Palestinian employment in Israel, heightens the importance of the development of the Palestinian private sector, which would need to absorb growing numbers of Palestinian workers.

The modified customs union established in the Economic Protocol subjected Palestinian imports to the Israeli customs regime,<sup>17</sup> with the exception of certain products that could be imported at tariff rates set by the PNA.<sup>18</sup> Thus, Israeli customs rules and practices would largely drive Palestinian imports. Although during the Economic Protocol negotiations the Palestinians pushed for a free trade arrangement that would allow them to set their own tariffs on imports, Israel wanted a customs union to avoid recognizing Palestinian borders as would be required under a free trade arrangement.<sup>19</sup> The political positions of the two sides led to the modified customs union, a compromise that "borrows certain elements of both a common market and a free trade area agreement."<sup>20</sup>

As for Palestinian exports to markets other than Israel, Oslo II granted the PNA the authority to negotiate agreements with States and international organizations to open foreign markets for Palestinian goods.<sup>21</sup> For the Palestinian private sector to develop, greater access to world markets would be needed, and such access "would also help attract foreign investors who might be interested in the Palestinian Territories as an export platform."<sup>22</sup>

### 3. Enabling Environment

When the Declaration of Principles was signed, it was clear the Palestinians had much work ahead creating the appropriate political and legal environment to encourage and assist private sector development. Decades of occupation left the Palestinian political and legal systems ill-prepared for facilitating a modern, market economy. The World Bank stressed in 1993 that many policy, legal, and institutional reforms were needed in the Palestinian Territories "in order to create a climate conducive to sustainable economic and social development."<sup>23</sup> Central to creating the proper enabling environment for private sector development are

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<sup>17</sup> *Id.* art. III(1).

<sup>18</sup> *See id.* arts. III(2), III(4), III(10).

<sup>19</sup> *See* Ephraim Kleiman, *The Economic Provisions of the Agreement Between Israel and the PLO*, 28 ISR. L. REV. 347, 354-55 (1994).

<sup>20</sup> *Id.* at 355.

<sup>21</sup> Oslo II, *supra* note 10, art. IX(5)(b).

<sup>22</sup> Fidler, *supra* note 8, at 162-63.

<sup>23</sup> 1 WORLD BANK, *supra* note 7, at 17.



transparent, modern, and efficient legal, regulatory, and institutional rules and processes.<sup>24</sup> Thus, legal reform and credible political institutions to implement the law are critical to the development of a modern Palestinian economy.

*B. Breakdown of the Oslo Strategy for Palestinian Economic Development*

Immediately after signing of the Declaration of Principles, optimism about the future of the Palestinian economy prevailed. As the World Bank observed, "[a] low-cost, well-educated work force with a strong entrepreneurial tradition, anticipated privileged access to markets (in Israel, the rest of the Middle East, and Europe), a Palestinian diaspora that is ready and able to provide investment funds, and committed support from the international community give the West Bank and Gaza appreciable economic potential."<sup>25</sup> Events have shattered this optimism as the Palestinian economy has suffered since September 1993. The July-August 1998 issue of the *Palestine Economic Pulse* captured the misfortune of the Palestinian economy as follows: "[t]he once optimistic future for Palestine's economy with its rich human resource base, its strategic geo-political location and religious significance, envisioned by many and documented in many literary sources . . . has faded into oblivion."<sup>26</sup> None of the elements of the Oslo strategy for Palestinian economic development has been achieved, which threatens the economic pillar of the peace process. In mid-June 1998, the U.S. Undersecretary for Economic, Business, and Agricultural Affairs referred to the condition of the Palestinian economy as a crisis.<sup>27</sup> The early fears that economic deprivation in the Palestinian Territories would affect attitudes towards the peace process find empirical support in the fact that "most West Bankers and Gazans actually blame their economic difficulties on Oslo."<sup>28</sup> Despite the economic troubles, Palestinians by and large still support the peace proc-

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<sup>24</sup> See *id.* (discussing the legal and regulatory framework).

<sup>25</sup> World Bank, *West Bank and Gaza* (visited Mar. 29, 1999) <<http://www.world-bank.org/html/extdr/offrep/mena/wb&g.htm>>.

<sup>26</sup> *The Paris Protocol Gridlock . . . What Next?*, PALESTINE ECON. PULSE, July-Aug. 1998, at 2, 3.

<sup>27</sup> See *id.* at 2; see also Jawad Naji, *From the Editor*, PALESTINE ECON. PULSE, Sept.-Oct. 1998, at 1, 1 (citing the Undersecretary's argument that "peace between Israelis and Palestinians would never take hold unless accompanied by 'jobs and economic security'").

<sup>28</sup> Khalil Shikaki, *The Politics of Paralysis II: Peace Now or Hamas Later*, FOREIGN AFF., July-Aug. 1998, at 29, 42.

ess,<sup>29</sup> but such support remains vulnerable to the effects of continued bad economic times.

### 1. Problems with International Aid

The breakdown in the Oslo economic development strategy is comprehensive. The international aid intended to jump start the reconstruction of the Palestinian economic infrastructure has been diverted to keeping the PNA afloat and funding emergency employment programs.<sup>30</sup> Controversies about delays in the distribution of aid have also dogged the relations between the PNA and the donor community.<sup>31</sup> Thus, "[t]he interdependence between public aid and private investment, identified by the World Bank and the donor countries as the key dynamic of economic development for Gaza and the West Bank, has not yet been established."<sup>32</sup>

### 2. Problems with the Economic Protocol

The Economic Protocol's free trade arrangement under which Palestinian goods were to move freely into Israeli markets has, from the Palestinian perspective, collapsed because of Israeli border closures and other security measures. Border closures have also created havoc for Palestinian labor flows into Israel.<sup>33</sup> The border closures, in response to political violence, pit Israel's need for security against the Palestinian need for

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<sup>29</sup> See *id.* (arguing that "[e]conomic failure does not erode Palestinian faith in the peace process").

<sup>30</sup> See World Bank, *West Bank and Gaza Update, First Quarter 1998*, (visited Feb. 24, 1999) <<http://www.palecon.org/update/mar98/contents.html>> (noting that negative political and economic events in the peace process "have thwarted donors' intentions and often impaired the most efficient use of their resources" and that "[d]onor assistance was redirected from intended investment to consumption-oriented, non-investment support aimed at mitigating the negative impact of these shocks").

<sup>31</sup> See Fidler, *supra* note 6, at 541 (discussing Palestinian concerns over the aid program).

<sup>32</sup> *Id.* at 543. According to the United Nations Office of the Special Coordinator in the Occupied Territories in February 1998, U.S.\$3.63 billion has been pledged by donor countries to the PNA, U.S.\$3.03 billion has been committed, and U.S.\$1.83 billion has been disbursed to support Palestinian development. See United Nations Office of the Special Coordinator in the Occupied Territories, *Special Report: The West Bank and Gaza Strip Private Economy*, pt. V.B (Feb. 1998) <<http://www.arts.mcgill.ca/mepp/unsco/private/report.html>> (visited Sept. 9, 1998).

<sup>33</sup> See Fidler, *supra* note 8, at 163-67 (discussing the havoc wreaked on the Palestinian economy by border closures).

economic development.<sup>34</sup> According to the *Palestine Economic Pulse*, attempts to find solutions to this basic clash of interests have largely proved to be a "dialogue of the deaf."<sup>35</sup> Leaving aside the border closure problem, the modified customs union arrangement has not worked well for the Palestinians. Palestinians complain that Israeli non-tariff barriers adversely affect Palestinian exports to Israel.<sup>36</sup> In addition, the instability of the business climate in the Palestinian Territories has encouraged many Palestinian businesses to import products "under the name of an Israeli intermediary, and in so doing, deprive the PNA of revenue which it is rightfully due."<sup>37</sup> Frustration with the Economic Protocol has also arisen because the modified customs union imposes on the Palestinian economy tariff costs higher than those the PNA would likely charge if it had control of Palestinian import policy.<sup>38</sup> Palestinian businesses and consumers pay higher prices for imports, while facing greatly restricted access to Israeli and world markets because of border closures and non-tariff barriers. Given all these factors, it is hardly surprising that the nature of the Israeli-Palestinian economic relationship structured in the

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<sup>34</sup> See *Palestinian-Israeli Economic Relations*, PALESTINE ECON. PULSE, May-June 1998, at 4, 4 ("For Palestinians, the primary issue of free access to import and export markets collides with the central Israeli concern of security at all levels of debate"); Mel Levine, *Palestinian Economic Progress Under the Oslo Agreements*, 19 FORDHAM INT'L L. J. 1393, 1406 (1996) (arguing that the Israeli-Palestinian situation "is a classic political/economic conundrum").

<sup>35</sup> *Palestinian-Israeli Economic Relations*, *supra* note 34, at 4. But see Wye River Memorandum, *supra* note 1, art. III (renewing processes to work on economic development in parallel with security issues).

<sup>36</sup> See Fidler, *supra* note 8, at 166 (discussing Israeli non-tariff barriers on Palestinian exports).

<sup>37</sup> *The Paris Protocol Gridlock . . . What Next?*, *supra* note 26, at 3. The PNA loses such revenue because, under the Economic Protocol, customs duties paid on products destined for the Palestinian Territories are to be paid to the PNA. Economic Protocol, *supra* note 10, art. III(15). The use of Israeli intermediaries means that goods really destined for the West Bank or Gaza are marked as Israeli imports, meaning the tariff payments go to Israel rather than the PNA. The payment of such tariff revenues to the PNA "is fundamental to the revenue performance of the PNA." *Development in Palestine: A New Direction*, PALESTINE ECON. PULSE, May-June 1996, at 2, 2. The practice of using Israeli intermediaries has resulted in the loss of "tens of millions of dollars of revenue" by the PNA. Keith C. Molkner, *Legal and Structural Hurdles to Achieving Political Stability and Economic Development in the Palestinian Territories*, 19 FORDHAM INT'L L. J. 1419, 1448 (1996); see also Naji, *supra* note 27, at 1 (noting in late 1998 that "[m]onies lost to the Israeli treasury in this respect are estimated to have cost the PNA some \$350 million per annum").

<sup>38</sup> Fidler, *supra* note 8, at 167.

Economic Protocol is being critically questioned.<sup>39</sup> Access to the lucrative Israeli market promised in the Economic Protocol aimed at attracting private investment, but the failure of the access to materialize in any significant way has deterred private investment in the Palestinian Territories.

While the PNA has been active in negotiating trade arrangements and agreements with other States,<sup>40</sup> Palestinian exports to world markets have not increased substantially because such exports have been dependent on Israeli ports and thus have been subject to the same problems as exports to Israel. This continuing need for Israeli trade access and infrastructure produces the situation that "the complex maze of documented trade agreements and mechanisms . . . have in practice done little to change its economic dependence on Israel."<sup>41</sup> Foreign investors have not, therefore, had much reason to view the Palestinian Territories as a stable export platform for accessing markets in Europe, the Middle East, and elsewhere. The stunted condition of Palestinian exports to world markets detrimentally affects overall Palestinian private sector development.

### 3. Problems with the Enabling Environment

Finally, the enabling environment considered central to developing the Palestinian economy has not materialized politically, economically, or legally. Widespread corruption has severely "tarnished the Palestinian Authority and further hurt prospects for Palestinian economic develop-

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<sup>39</sup> See, e.g., *Palestinian-Israeli Trade Relations: Free Trade Area or Customs Union?* 1 PALESTINE ECON. POLICY RESEARCH INST. 1 (Nov. 1996) (M.A.S.) (visited Sept. 8, 1998) <<http://www.palecon.org/masdir/notes/freetrade.html>> (reporting on economic forum debating optimal trade regime for Palestinian Territories); Fidler, *supra* note 8, at 188 (arguing that "the free trade area plus customs union arrangement needs to be replaced with a straight free trade agreement between the Palestinians and Israel"); *Palestinian-Israeli Economic Relations*, *supra* note 34, at 4 (reporting on exchange of views at seminar on Israeli-Palestinian economic relations); *Political Separation and Economic Integration*, PALESTINE ECON. PULSE, May-June 1998, at 5 (reporting on economic integration ideas of Shimon Peres); *The Paris Protocol Gridlock . . . What Next?*, *supra* note 26, at 2 (analyzing the Economic Protocol); Joe Saba, *The World Bank on Palestinian Competitiveness*, PALESTINE ECON. PULSE, Sept.-Oct. 1998, at 3, 3-6 (recounting a recent speech by World Bank Resident Mission Director for the West Bank and Gaza arguing that the Economic Protocol and its application hurt Palestinian competitiveness).

<sup>40</sup> The PNA has negotiated trade agreements with Jordan, Egypt, and the European Union, and is negotiating agreements with Turkey and the European Free Trade Association. In addition, the PNA has a free trade arrangement with the United States.

<sup>41</sup> Jawad Naji, *From the Editor . . .*, PALESTINE ECON. PULSE, Mar.-Apr. 1998, at 1.

ment."<sup>42</sup> After an internal audit revealed that PNA corruption and mismanagement wasted approximately U.S.\$326 million, or forty percent of the PNA's annual budget, the Palestinian Legislative Council put serious pressure on Arafat and his council to clean up the PNA. In June 1998, Arafat "agreed to reshuffle the PNA Ministerial Cabinet accused of corruption, and appealed to the Palestinian Legislative Council . . . to delay its proposed no-confidence vote."<sup>43</sup> While the PNA has moved to put an end to the widespread corruption, the corruption scandal further deepened the concerns of foreign investors about the Palestinian Territories as an investment location. Moreover, the scandal constituted a manifest failure by the PNA to create and maintain the proper political enabling environment for private sector development.

Economically, the PNA's public statements about its desire to promote a free market economy clash with its "practice of creating trade monopolies for itself."<sup>44</sup> The PNA has established import monopolies on a number of products.<sup>45</sup> The PNA trade monopolies are not secretive matters as "[c]oncerns about the attempts by the Palestinian Authority to monopolize sectors of the Palestinian economy are commonplace among investors and groups trying to facilitate the peace process and Palestinian economic development."<sup>46</sup> The Israeli director of the Israel/Palestinian Center for Research and Information (IPCRI) has argued that PNA monopolistic behavior "will strangle the private sector and delay or prevent economic development."<sup>47</sup> In the wake of the corruption scandal, the PNA has moved to reorganize or privatize government eco-

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<sup>42</sup> Fidler, *supra* note 8, at 184-85 (discussing PNA corruption and its effects on Palestinian economic development) (citing Neil MacFarquhar, *The Sullen Love: As Gaza Stagnates, Arafat is Blamed as Well as Israel*, N.Y. TIMES, Aug. 16, 1997, at 1). After investigating PNA corruption, David Hirst of *The Guardian* newspaper concluded in April 1997 that Arafat "and his coterie of unofficial economic 'advisors' have thrown up a ramshackle, nepotistic edifice of monopoly, racketeering and naked extortion which merely enriches them as it further impoverishes society at large." David Hirst, *Shameless in Gaza*, GUARDIAN, Apr. 21, 1997, at 9.

<sup>43</sup> *Economic Diary*, PALESTINE ECON. PULSE, July-Aug. 1998, at 15, 15.

<sup>44</sup> Fidler, *supra* note 8, at 183.

<sup>45</sup> See Hirst, *supra* note 42, at 9.

<sup>46</sup> Fidler, *supra* note 8, at 183.

<sup>47</sup> *Id.* at 183 (quoting Letter to President Clinton from Gershon Baskin, Israeli Director of the Israel/Palestinian Center for Research and Information, Apr. 4, 1997 (on file with author)); see also Saba, *supra* note 39, at 4-5 (analyzing the detrimental economic consequences of the development of "Palestinian public or semi-public monopolies" for importing goods).

conomic enterprises;<sup>48</sup> but the monopolies, like the corruption scandal, have hurt the development of an enabling environment for Palestinian economic development.

The need for legal and regulatory reform identified in 1993 as critical for private sector development remains an obstacle to Palestinian economic development. Five years after first identifying the need for legal and regulatory reform, the World Bank still maintains that "the business environment suffers from confusing commercial legislation and a lack of public sector regulatory institutions."<sup>49</sup> While efforts have been made by the PNA to address the needs for legal reform, these efforts have not always been successful. The Investment Law is a case in point. Despite the central importance of foreign investment to Palestinian economic development, the original Investment Law promulgated by the PNA was criticized by intergovernmental and academic experts as an inadequate legal response for Palestinian economic development.<sup>50</sup> Similar concerns have been expressed about the Palestinian telecommunications law<sup>51</sup> and the laws to regulate the industrial estates within the Palestinian Territories.<sup>52</sup> The Palestinian Stock Exchange has been operating for over a year without an adequate regulatory framework or securities

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<sup>48</sup> See Saba, *supra* note 39, at 6 (urging PNA to privatize the public and semi-public enterprises dominating importing).

<sup>49</sup> WORLD BANK, *supra* note 25; see also Saba, *supra* note 39, at 4 (World Bank official arguing in September 1998 that Palestinian economic development is still hindered by the "[c]ontinued lack of development of the legal infrastructure for business").

<sup>50</sup> See, e.g., *The Legal Framework for Business in the West Bank and Gaza Strip*, MAS POL'Y NOTES 3 (Sept. 1996) Palestine Economic Policy Research Institute (MAS) <<http://www.palecon.org/masdir/notes/framework.html>> (discussing critical comments of Joseph Battat of the World Bank on the original Investment Law); WORLD BANK, *supra* note 25 (arguing the PNA "should give early attention to passage of a new investment law"); Fidler, *supra* note 6, at 529 (providing a critical analysis of Original Investment Law); David P. Fidler, *Economic Development, Foreign Investment and the Peace Process: Recent Events Make Revision of Palestinian Investment Law Even More Critical*, MIDDLE E. EXECUTIVE REP., Nov. 1996, at 8.

<sup>51</sup> See Sam Bahour, *Telecommunications Regulations . . . Competency is a Must*, PALESTINE ECON. PULSE, May-June 1998, at 13 (Stating that "[a] serious review of this Law . . . is urgently needed. In its current somewhat antiquated form, it lacks the necessary provisions for the dynamic challenges facing the global telecommunications sector").

<sup>52</sup> See Ezra Sadan, *Industrial Parks in Territories Controlled by the Palestinian Authority* (visited Mar. 5, 1999) <<http://www.ipcri.org/ind.html>> (reporting that potential investors are worried about incomplete legislation).

law.<sup>53</sup> Impediments regarding basic commercial and property laws must be addressed to create an attractive environment for private sector investment.<sup>54</sup> While international organizations, governments, and non-governmental organizations are working with the PNA on legal reform,<sup>55</sup> much work remains in creating the proper legal enabling environment for private sector development.

Larger legal issues also complicate Palestinian economic development. For example, Arafat has not approved the Palestinian constitution — the Basic Law — although it has been approved by the Palestine Legislative Council.<sup>56</sup> While Arafat's failure to sign may be related to the lack of progress in the peace process and the anomaly of enacting a constitution when the PNA does not even control its own borders, the absence of this fundamental law adds to the legal vacuum businesses perceive in the Palestinian Territories.<sup>57</sup> It also contributes to concerns about the PNA's lack of respect for human rights, prominently documented in a critical report by Amnesty International.<sup>58</sup> The Wye Memorandum also highlighted PNA human rights problems by providing that "the Palestinian Police will exercise powers and responsibilities to implement this Memorandum with due regard to internationally accepted

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<sup>53</sup> See *The PSE – Ahead of Its Time*, PALESTINE ECON. PULSE, May-June 1998, at 11 (noting that "[r]egulation is also still a serious problem").

<sup>54</sup> See Saba, *supra* note 39, at 4 (noting the need to improve Palestinian tax, judicial, commercial, and property laws).

<sup>55</sup> See, e.g., World Bank, *West Bank and Gaza Update, Second Quarter 1998* (visited Sept. 8, 1998) <<http://www.palecon.org/update/jun98/operations.html>> (reporting on World Bank's U.S.\$5.5 million Legal Development Project that "aims at assisting the PA in modernizing the legal framework and increasing the efficiency and predictability of the judicial process" and on World Bank's specific efforts on insurance, securities, mortgage, tax, mutual funds, and competition law reform).

<sup>56</sup> See THE PALESTINIAN BASIC LAW (Third Reading) (1998) (Palestine), translated by Saladin Al-Jurf [hereinafter BASIC LAW]. The text of the PALESTINIAN BASIC LAW is reprinted in the Appendix to this issue of the *Case Western Reserve Journal of International Law*. 31 CASE W. RES. J. INT'L L. 495 (1999); Julian Borger, *The Shadow of the Hawk*, GUARDIAN, Aug. 17, 1998, at 2 ("Arafat has so far withheld his signature from a basic law that would provide the [Palestinian Authority] with a constitutional structure").

<sup>57</sup> See Deborah Horan, *Israeli and Palestinian Investors Are for Peace*, Inter Press Serv., Feb. 2, 1998, available in LEXIS, News Library, CURNWS File (noting concerns of businessmen about the lack of a basic law and the condition of laws governing commerce).

<sup>58</sup> AMNESTY INTERNATIONAL, PALESTINIAN AUTHORITY: PROLONGED POLITICAL DETENTION, TORTURE AND UNFAIR TRIALS, AI INDEX: MDE 15/68/96 (1996); see also Fidler, *supra* note 8, at 185-86 (discussing human rights abuses of PNA).

norms of human rights and the rule of law, and will be guided by the need to protect the public, respect human dignity, and avoid harassment."<sup>59</sup> As of yet, the "rule of law" does not characterize Arafat's or the PNA's governance of the Palestinian economy or people.

#### 4. Private Investment in the Palestinian Territories

All these factors have combined to create low levels of private investment, both domestic and foreign, in the Palestinian Territories. Domestically, most of the private investment has been channeled into residential housing, a type of investment that "has lesser impact in terms of increasing the productive capacity of the economy."<sup>60</sup> The World Bank noted that "[p]rivate investment over the 1994 to 1997 period (excluding housing, which does not expand productive capacity) averaged a low 8.75 percent of GDP."<sup>61</sup> The World Bank estimates that, in 1996, gross investment in residential housing amounted to fourteen percent of GNP, while gross investment in machinery and equipment totaled seven percent of GNP.<sup>62</sup> The International Monetary Fund estimates that private investment levels of fifteen to twenty percent of GDP are needed for tangible economic growth.<sup>63</sup>

Foreign investment has also been very low. Although the PNA claims there has been approximately U.S.\$1 billion in foreign investment in the Palestinian Territories, this number corresponds to the amount of money contributed in a variety of ways, from business investment to remittances to family members by Palestinian diaspora. Thus, it is hard to give much weight to the PNA claims of U.S.\$1 billion in actual foreign investment.

More revealing is the rise and fall of Builders for Peace, a non-profit organization established by the Clinton administration, after the signing of the Declaration of Principles, to encourage foreign investment in the Palestinian Territories. Organized in the optimistic days of the post-Declaration period, Builders for Peace closed its doors in August

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<sup>59</sup> Wye River Memorandum, *supra* note 1, art. II.C.4.

<sup>60</sup> World Bank, *West Bank and Gaza Update, First Quarter 1998*, *supra* note 7; see also United Nations Office of the Special Coordinator in the Occupied Territories, *supra* note 7, at 6 ("Residential construction has been and remains the main type of private investment in the WBGS").

<sup>61</sup> World Bank, *supra* note 30.

<sup>62</sup> See *id.*

<sup>63</sup> See *Palestine Special Report*, MEED Weekly Special Report, July 17, 1998, available in LEXIS, News Library, CURNWS File (citing IMF analysis of Palestinian private investment).



1997 because the investment climate in the Palestinian Territories was inhospitable to foreign investors. In addition, the highly touted industrial zones to be established in Gaza and the West Bank, which were intended to attract foreign investors, have captured the interest of mainly local Palestinian business, Israeli companies, and some Palestinian diaspora groups.<sup>64</sup> Israeli actions also seem to be undermining the potential of the Palestinian industrial zones as "Israel currently plans to develop an industrial estate on confiscated Palestinian land in the West Bank in Kufr Qumran near Nablus."<sup>65</sup> This Israeli move seems "to undermine the whole purpose" of the Gaza industrial estate.<sup>66</sup>

Although the economic outlook for the Palestinian economy is bleak, private sector investment initiatives continue, as indicated by the slow progress made on the industrial estates. The recently established Peace Technology Fund (PTF) is another innovative attempt to increase private sector investment in the Palestinian Territories. The PTF consists of investment capital from Palestinians (domestic and diaspora), Israelis, and the World Bank.<sup>67</sup> The fundamental objective of the PTF "is to invest in Palestine . . . in support of economic development."<sup>68</sup> The PTF's creators hope the Fund will be a catalyst for attracting foreign investors.<sup>69</sup> The initial investment strategy of the PTF shows, however, the marks of the generally poor investment climate in the Palestinian Territories. For example, the Fund does not plan to provide resources to new ventures but "to buy minority shares in existing Palestinian-owned businesses in the West Bank and Gaza."<sup>70</sup> In addition, the PTF will avoid investments in businesses that depend on sales in Israel and abroad because such businesses bear the full brunt of border closures and other

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<sup>64</sup> See WORLD BANK, *supra* note 25 (noting that surveys indicate that the initial tenants of the Gaza industrial zone "will come mainly from existing enterprises in Gaza, and some West Bank, Israeli, and overseas Palestinian groups"); see also Fidler, *supra* note 8, at 180-81 (discussing problems that have plagued the industrial zones concept).

<sup>65</sup> *Political Separation and Economic Integration*, *supra* note 39, at 5.

<sup>66</sup> *Id.*

<sup>67</sup> See Horan, *supra* note 57.

<sup>68</sup> Marie-Helene Nougaret, *The Peace Fund—An Investment Model?*, PALESTINE ECON. PULSE, Mar.-Apr. 1998, at 4, 5.

<sup>69</sup> See *id.* at 5 (quoting World Bank representative Tamara Lansky as stating that the Fund "would also like to act as a catalyst to attract foreign investments").

<sup>70</sup> Horan, *supra* note 57.

Israeli actions.<sup>71</sup> In spite of the latest efforts to increase private sector investment, the future of the PTF remains uncertain.<sup>72</sup>

Another prominent investment initiative is the Bethlehem 2000 Project, a U.S.\$300 million project that will "attempt to set the course towards the millennium celebrations and simultaneously provide a better and more suitable environment for the tourism industry into the next decade."<sup>73</sup> All is not well, however, with this endeavor, as analyzed early in 1998 by the *Palestine Economic Pulse*.<sup>74</sup> Funding, infrastructure development, Israeli cooperation, PNA coordination, and lack of adequate time constitute problems for the Bethlehem 2000 Project.<sup>75</sup>

The preceding brief look at Palestinian private sector investment suggests that foreign investors will not be pouring money into the Palestinian Territories regardless of how good the Revised Investment Law is. The question to which I turn next is whether the PNA has created even more disincentives for foreign investors in the Revised Investment Law.

## II. BRIEF HISTORY OF THE PALESTINIAN INVESTMENT LAW

The adoption and revision of the Palestinian Investment Law form part of the PNA's attempt to create the proper legal enabling environment for investment. Between the Declaration of Principles in 1993 and the adoption of the original Palestinian Investment Law in 1995, the legal structure for investment in the Palestinian Territories was inadequate. A 1994 IPCRI analysis argued that the legal environment for investment suffered from five major problems: (1) governmental authorities had too much discretion in the investment approval process; (2) free transferability of profits and capital was not guaranteed; (3) governmental authorities could retroactively cancel benefits and impose severe penalties without reference to transparent standards and without adequate legal recourse against such actions; (4) investors were not protected against expropriation, and the laws provided for no standard of compensation; and (5) access to international arbitration to settle disputes was

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<sup>71</sup> See *id.*

<sup>72</sup> See Nougaret, *The Peace Fund—An Investment Model*, *supra* note 68, at 6 (discussing the uncertain future of the PTF).

<sup>73</sup> World Bank, *supra* note 55 (detailing the Bethlehem 2000 Project and the World Bank's contribution to it); see also *Palestine Special Report*, *supra* note 63 (describing Bethlehem 2000 Project).

<sup>74</sup> *O Little Town of Bethlehem . . . How Still We See Thee Lie*, PALESTINE ECON. PULSE, Jan.-Feb. 1998, at 2.

<sup>75</sup> See *id.* at 2-3.

inadequate.<sup>76</sup> The need for a modern, unified investment law was recognized early in the peace process; but the Original Investment Law was not adopted until April 1995.<sup>77</sup> When the Investment Law was adopted, it was a disappointment. As noted earlier, the Original Investment Law was criticized by intergovernmental and academic experts as inadequate. In response to such criticisms, the PNA engaged in consultations with the World Bank and the United Nations Development Programme seeking advice on how to improve the law. This process transpired during 1996-1997, and the PNA promulgated the Revised Investment Law in April 1998. It subsequently went into effect in May 1998.

### III. ANALYSIS OF THE REVISED INVESTMENT LAW

This part of the Article analyzes the official English-language translation of the official Arabic text of the Revised Investment Law, which is provided as an Appendix to this Article.<sup>78</sup> The Revised Investment Law provides that the Palestinian Investment Promotion Agency will issue implementing Regulations for the Law,<sup>79</sup> which will become an important part of the legal investment regime but are not available for analysis in English as of this writing. The analysis examines the provisions of the Revised Investment Law and explores ambiguities, questions, and problems that a reading of the text reveal. I also note where the Revised Investment Law does not adhere to international standards and practices incorporated in the World Bank's Guidelines on the Treatment of Foreign Direct Investment<sup>80</sup> and bilateral and multilateral treaties dealing with the treatment of foreign investment, including the proposed Multilateral Agreement on Investment (MAI) being negotiated under the auspices of the Organization for Economic Co-operation and Development (OECD).<sup>81</sup>

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<sup>76</sup> Keith Molkner & Ra'ed Abdul Hamid, *The Legal Structure for Foreign Investment in the West Bank and the Gaza Strip*, 1 I.P.C.R.I. L. & DEV. PROGRAM COM. L. REP. 33-38 (1994) (analyzing legal situation applying to foreign investment in the Palestinian Territories before the original Investment Law).

<sup>77</sup> See Fidler, *supra* note 6, at 546 & n. 77 (describing recognition of need for new investment law and repeated PNA promises that such a law would be adopted).

<sup>78</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5.

<sup>79</sup> *Id.* art. 47 (stating "The Board of Directors shall issue the Regulations to implement this Law . . .").

<sup>80</sup> World Bank Guidelines on the Treatment of Foreign Direct Investment, reprinted in IBRAHIM F. I. SHIHATA, *THE LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES* 155-64 (1993) [hereinafter *WORLD BANK GUIDELINES*].

<sup>81</sup> See generally Multilateral Agreement on Investment, MAI Negotiating Text (visited Feb. 7, 1999), available at <<http://www.oecd.org/daf/cmismai/negtext.htm>>

### A. Scope of the Revised Investment Law

The scope of the Revised Investment Law comprises two factors: (1) the range of investment opportunities in the Palestinian economy covered by the Law; and (2) the types of investments covered by the Law. Article 4 of the Revised Investment Law states that "[a]ny Investor may invest in any sector of the Palestinian economy; provided, however, that the Investment is not prohibited by specific laws."<sup>82</sup> This apparently open investment policy is, however, compromised by the definition of "Investment" and by other provisions in the Revised Investment Law. "Investment" is defined "as actual monetary investment of capital (fixed capital assets) by an Investor in an Enterprise, whether a newly created or an existing enterprise."<sup>83</sup>

This definition of Investment creates confusion because it can be interpreted narrowly or broadly. Under a narrow interpretation, an Investment only includes monetary expenditures of capital in fixed capital assets, which excludes capital expenditures for equity and debt securities, real estate, or investments in kind, such as intellectual property and know how. All these types of capital expenditures form part of making investments in new or existing enterprises, but their exclusion from a narrow interpretation of Investment means that they would not be (1) protected by the general guarantees provided by the Revised Investment Law,<sup>84</sup> or (2) eligible for the incentives offered by the Law.<sup>85</sup> While excluding certain types of investments from the incentives makes sense, the possible exclusion of any investment from the protections of the Revised Investment Law should be a source of investor concern. For example, under a narrow interpretation of investment, Peace Technology Fund equity investments in existing Palestinian companies would not be covered

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(reprinting the text as of April 24, 1998) [hereinafter MAI]. Although the MAI has not been finalized for adoption by States, it does provide valuable information about international standards for treatment of foreign investment. *See also generally Multilateral Agreement on Investment: Report by the Chairman of the Negotiating Group* (Apr. 28, 1998) (visited Mar. 1, 1999) <<http://www.oecd.org/daf/cmisi/mai/repor98.htm>>.

<sup>82</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 7.

<sup>83</sup> *Id.* art. 1. *See* Fidler, *supra* note 6, at 555-56 (discussing problems with the definition of "investment" in the Original Investment Law); LAW ON THE ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 1, *translated in* Fidler, *supra* note 6, app. at 603.

<sup>84</sup> *See* discussion *infra* Part III.B (discussing the general guarantees in the Revised Investment Law).

<sup>85</sup> *See* discussion *infra* Part III.D (discussing the incentives in the Revised Investment Law).

by the general guarantees provided in the Revised Investment Law. The narrow interpretation of Investment would substantially reduce the scope of the Revised Investment Law and raises serious concerns for investors.

A narrow definition of Investment in the Revised Investment Law would also cut against international standards and practices which use a broader definition of investment that covers a wide variety of assets, rights, and interests. Broad definitions of Investment are standard in European and United States bilateral investment treaties.<sup>86</sup> These broad definitions include every kind of asset or investment, and often provide specific, non-exclusive lists of assets that are covered by the definitions.<sup>87</sup>

The definition of Investment can also be interpreted more broadly. If the parenthetical containing the term "fixed capital assets" is intended only to be illustrative rather than exclusive, then the definition of Investment could include monetary investments of capital in equity and debt securities, real estate, and investments in fixed capital assets. Two concerns remain, however, with this broader interpretation. First, it still does not include investments in kind, such as intellectual property and know how, that are usually included in definitions of Investment in investment treaties. Second, the broad interpretation of Investment creates problems for the Revised Investment Law's provisions that grant tax incentives for Investments because it would mean that the PNA would be giving tax relief to Enterprises in which Investors merely made passive investments. The PNA did not, I believe, intend to award tax incentives for passive investments. The narrow interpretation of Investment makes sense in connection with the Incentives provisions but seriously cuts against international standards on defining Investment.

In all likelihood, the PNA intended the Revised Investment Law to have a broad definition of Investment. The definition of Investment, however, should also include investments in kind. It is my understanding that the Regulations cover investments in kind. In addition, the Incen-

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<sup>86</sup> See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 27 (1995).

<sup>87</sup> See, e.g., MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. I(d), reprinted in Eleanor Roberts Lewis, *The United States Bilateral Investment Treaty Program: Protection for U.S. Investors Overseas*, 1 CORP. L. & PRAC. COURSE HANDBOOK SERIES 133, 134 (No. B-863) (1994); MODEL TREATY: TREATY BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND \_\_\_\_\_ CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, Feb. 1991, art. 1.1, reprinted in DOLZER & STEVENS, *supra* note 86, annex I at 187 [hereinafter GERMAN INVESTMENT TREATY]; North American Free Trade Agreement, Dec. 8, 1992, U.S.-Can.-Mex., 32 I.L.M. 605, 647-48, art. 1139 [hereinafter NAFTA]; MAI, *supra* note 81, § II, art. 2.

tives provisions require a narrower term than Investments in order to tailor the Incentives to the type of capital investments the PNA wants to encourage. Perhaps the Regulations deal with this issue as well.

Other provisions also create questions about the scope of the Revised Investment Law. Article 5, for example, subjects any investment in seven important economic sectors to "pre-approval from the Council of Ministers".<sup>88</sup> Investing in any of these sectors subjects the investor to an approval process that is explicitly political. As argued in connection with the same provision in the Original Investment Law, "[g]iven the desperate need for investment in such infrastructure and fundamental economic areas, the rationale behind singling these industry sectors out for explicitly political approval is unclear."<sup>89</sup> The PNA's past penchant for corruption and creating economic monopolies combined with the carving out of these basic economic sectors might raise worries among foreign investors about the PNA playing politics with the economic development of important sectors of the Palestinian economy.<sup>90</sup> The Revised Investment Law provides for no procedures about how an investor should approach the Council of Ministers, nor does it contain any criteria to discipline the deliberations by the Council of Ministers on such investment requests. Moreover, it does not even state that such procedures and standards will be provided for in the implementing Regulations. It is my understanding that the Regulations require that an investor seeking to invest in one of these seven economic sectors submit to the Council of Ministers a letter supported by a recommendation from the Palestine Investment Promotion

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<sup>88</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 5. The seven economic sectors are: (1) manufacturing and distribution of weapons, ammunition or their parts; (2) aviation industries, including airports; (3) electrical power generation and distribution; (4) processing of petroleum and its derivatives; (5) reprocessing of refuse and solid waste; (6) communications and telecommunications services; and (7) radio and television. The Original Investment Law had a similar provision. See Law on the Encouragement of Investment (1995) (Palestine), art. 14, *translated in* Fidler, *supra* note 6, app. at 608. For an analysis of this Article 14, see Fidler, *supra* note 6, at 567-68.

<sup>89</sup> Fidler, *supra* note 6, at 568.

<sup>90</sup> The World Bank Guidelines stress that "[e]ach State will take appropriate measures for the prevention and control of corrupt business practices . . ." WORLD BANK GUIDELINES, art. III.8, *supra* note 80, at 160. The importance of fighting corrupt business practices was reinforced by the adoption in 1997 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, *available in* OECD Finance Investment, Taxation, and Competition (visited Feb. 1, 1999) <<http://www.oecd.org/daf/cmisi/bribery/20nov1e.htm>>.

Agency (Agency). It is not clear, however, whether the Regulations contain (1) rules on what information the investor must submit to the Agency, (2) criteria to discipline the Agency's review of the application, and (3) criteria to discipline the Council of Minister's review of the investor's letter and Agency recommendations. Thus, one of the most important international standards in foreign investment protection—transparency—is not advanced by this political provision.<sup>91</sup>

The scope of the Revised Investment Law is also affected by Article 44's prohibition against giving incentives to certain businesses, namely commercial enterprises, insurance companies, real estate companies (except developers), banks, foreign currency dealers, and any financial institution (except housing mortgage companies).<sup>92</sup> This exclusionary provision is ambiguous because it does not define "commercial enterprise." Article 44 cannot mean that any enterprise engaged in commerce is excluded from benefiting from the incentives in the Revised Investment Law. It is not clear, however, exactly what the exclusion covers. The transparency of the Law suffers as a result. In addition, the rationale for excluding these types of commercial undertakings is not clear, suggesting the exclusion is more political than economic in nature.

Article 6 of the Revised Investment Law relates to the scope of the Investment Law as it provides that "[a]ll Investments in Palestine must be legally established and registered in accordance with the provisions of this Law."<sup>93</sup> This provision probably means that all Enterprises in which Investments are made must be established and in good standing under Palestinian law for the Revised Investment Law to apply to such Enterprise and Investment. Thus, the transparent and effective functioning of Palestinian company law is very important to the operation of the Revised Investment Law. Foreign investors might be concerned about this because the West Bank and Gaza do not yet have an unified company law. Companies registered in either the West Bank or Gaza can, how-

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<sup>91</sup> See WORLD BANK GUIDELINES, art. III.8, *supra* note 80, at 160 (describing need to promote accountability and transparency in dealings with foreign investors); see also Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIMS] (containing the transparency principle in art. 6); General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (the Uruguay Round): General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44, 49-50 (1994) [hereinafter GATS] (containing the transparency principle); MAI, *supra* note 81, § III.

<sup>92</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 44.

<sup>93</sup> *Id.* art. 6.

ever, conduct business in the other without having to register again in the other jurisdiction.<sup>94</sup>

A final provision that relates to the scope of the Revised Investment Law is Article 46, which states that the Revised Investment Law "supercedes and replaces all prior laws dealing with investment in Palestine."<sup>95</sup> The Revised Investment Law now constitutes *the* legal framework for investments in the Palestinian Territories. It does, however, contain a grandfather clause for incentives granted under prior laws so that such incentives continue "until they terminate or expire under the terms of the laws under which they were issued."<sup>96</sup>

## B. General Guarantees

### 1. Non-Discrimination

Article 7(A) states that "[n]o Investor will be discriminated against on any basis whatsoever in the application of the incentives provided for under this Law."<sup>97</sup> This non-discrimination provision raises two concerns. First, the confusion about the definition of Investment affects the interpretation of Article 7(A) because the term "Investor" could be interpreted to mean that only those individuals or companies that made Investments (narrowly construed) are protected by the non-discrimination principle. All investments of any kind should be covered by the protections of the principle of non-discrimination.

Second, the word "incentives" in Article 7(A) is ambiguous because it is not clear whether this word means "Incentives" as defined by the Revised Investment Law or has a broader meaning. If Article 7(A) applies the non-discrimination principle only to the Incentives granted by the Revised Investment Law, then Article 7(A) is inadequate in terms of international standards on non-discrimination. Bilateral and multilateral investment agreements apply, for example, the non-discriminatory national treatment and most-favored-nation principles to all aspects of investments, not just to incentives.<sup>98</sup> If "incentives" has a broader meaning,

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<sup>94</sup> See generally SMALL BUSINESS SUPPORT PROJECT, HANDBOOK FOR PALESTINIAN BUSINESSES: HOW TO CONDUCT BUSINESS IN THE PALESTINIAN TERRITORIES 13-33 (1996) (describing how to register businesses in the West Bank and Gaza).

<sup>95</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 46

<sup>96</sup> *Id.* art. 43.

<sup>97</sup> *Id.* art. 7(A).

<sup>98</sup> See, e.g., MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. II, reprinted in Lewis, *supra* note 87, at 136; GERMAN INVESTMENT TREATY, *supra* note 87, art. 3; NAFTA, *supra* note 87, arts. 1102-03; GATS, *supra* note 91, arts. II(1), XVII;



then foreign investors might be less concerned. Perhaps Article 7(A) is intended to have the same scope as Article 18.2 of the Original Investment Law, stating that "[f]oreign, Arab and expatriate Palestinian investors shall enjoy the same rights and privileges as those granted to local Palestinian investors."<sup>99</sup> Article 18.2 assured all foreign investors national treatment in connection with all rights and privileges available to Palestinian investors. Article 7(A) should at least offer the same protections as Article 18.2 of the Original Investment Law. Perhaps the Regulations provide more clarity on this important point.

The Revised Investment Law also undermines the non-discrimination principle in Article 25(D), which provides that the PNA "may grant preferential treatment or grant special guarantees or incentives to the national investor."<sup>100</sup> This is a *prima facie* violation of the principle of national treatment, which is a fundamental international standard on the protection of foreign investment.<sup>101</sup>

Article 7(B) provides that the PNA may grant preferential treatment to certain investors under trade and investment agreements.<sup>102</sup> This provision gives the PNA the flexibility to grant investors from certain countries preferential rights and privileges under agreements with other States, much like the United States grants preferential investment arrangements to investors from Canada and Mexico under NAFTA. Such preferential treatment under bilateral or multilateral agreements does not contradict international standards.<sup>103</sup>

## 2. Nationalization and Expropriation

Article 8 prohibits the nationalization of any Investment.<sup>104</sup> The scope of this prohibition depends, of course, on how broadly or narrowly Investment is defined. The broad definition of Investment produces a

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MAI, *supra* note 81, § III, art. 1-2; WORLD BANK GUIDELINES, art. III.3, *supra* note 80, at 158 (requiring national treatment); TRIMS, *supra* note 91, art. 2(2) (addressing national treatment).

<sup>99</sup> LAW ON THE ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 18(2), translated in Fidler, *supra* note 6, app. at 608-09.

<sup>100</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 25(D).

<sup>101</sup> See sources cited *supra* note 98.

<sup>102</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 7(B).

<sup>103</sup> See WORLD BANK GUIDELINES, art. III.4, *supra* note 80, at 158-59 ("Nothing in this Guideline will automatically entitle nationals of other States to the more favorable standards of treatment accorded to the nationals of certain States under any customs union or free trade area agreement").

<sup>104</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 8.

wider scope of application for the prohibition on nationalization, which is another argument in favor of the broad definition.

The Revised Investment Law prohibits the expropriation of any Investment "except in exceptional cases for a public purpose, with due process of law accorded to the Investor subject to an expropriation."<sup>105</sup> Again, the scope of the term Investment affects another key provision of the Revised Investment Law. Foreign investors will be uncomfortable with expropriation provisions that apply only to a narrow range of investments. Another serious problem with the expropriation provision is that it does not contain the principle of non-discrimination, which represents an international standard in connection with expropriation.<sup>106</sup> The Revised Investment Law is less explicit on this non-discrimination point than the Original Investment Law, which provided that no investment would be expropriated "irrespective of the investor's nationality."<sup>107</sup> One interpretation of this issue is that the general non-discrimination provision in Article 7(A) applies to expropriation actions as well because protections against certain types of expropriations are "incentives" covered by Article 7(A). As noted above, however, the scope of Article 7(A) is not clear. A less charitable reading of Article 9 would note that the PNA deliberately decided to refrain from including a non-discrimination principle in its expropriation provisions despite the presence of such a principle in the Original Investment Law and the importance of such a principle in international standards on foreign investment because the PNA desired to retain the ability to discriminate against certain investors on the basis of nationality or some other factor.

Important to foreign investors is the standard of compensation in cases of expropriation. The Original Investment Law contained no standards for compensation of investors for expropriations.<sup>108</sup> The Revised

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<sup>105</sup> *Id.* art. 9. *See also id.*, art. 8 (stating the PNA "shall not expropriate any investment except by operation of Law").

<sup>106</sup> *See* WORLD BANK GUIDELINES, art. IV.1, *supra* note 80, at 161 (permitting expropriation only "without discrimination on the basis of nationality"); MODEL UNITED STATES BILATERAL INVESTMENT TREATY art. III(1), *reprinted in* Lewis, *supra* note 87, at 136 (allowing expropriation only "in a non-discriminatory manner"); GERMAN INVESTMENT TREATY, *supra* note 87, art. 4(4) (applying "most-favored-nation treatment" to expropriations); NAFTA, *supra* note 87, art. 1110(1) (expropriation only "on a non-discriminatory basis"); MAI, *supra* note 81, § IV, art. 2.1(b) (allowing expropriation only "on a non-discriminatory basis").

<sup>107</sup> LAW ON THE ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 18(1), *translated in* Fidler, *supra* note 6, app. at 608; *see* Fidler, *supra* note 6, at 570-71 (discussing the expropriation provisions in the Original Investment Law).

<sup>108</sup> *See* Fidler, *supra* note 6, at 588.

Investment Law states that Investors subject to an expropriation "shall be compensated the fair market value and for losses suffered because of such expropriation."<sup>109</sup> International standards suggest that compensation for expropriation must be prompt, adequate, and effective.<sup>110</sup> Bilateral and multilateral investment agreements often define in detail what prompt, adequate, and effective compensation means. Adequate usually means payment of the equivalent of the fair market value of the expropriated investment immediately before the act of expropriation occurred.<sup>111</sup> Prompt is usually defined as payment of compensation without

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<sup>109</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 9.

<sup>110</sup> WORLD BANK GUIDELINES, art. IV.1-2, *supra* note 80, at 161 (defining appropriate compensation as "adequate, effective and prompt" compensation); see MODEL UNITED STATES BILATERAL INVESTMENT TREATY art. III(1), *reprinted in* Lewis, *supra* note 87, at 138 (requiring "prompt, adequate and effective compensation"); GERMAN INVESTMENT TREATY, *supra* note 87, art. 4(2) (laying out standard of compensation, including value to be compensated without delay); NAFTA, *supra* note 87, art. 1110(2)-(6) (laying out compensation requirements); MAI, *supra* note 81, § IV, arts. 2.1(d)-2.5 (setting out requirements for "prompt, adequate and effective compensation"). In international law, the prompt, adequate, and effective standard has been controversial. See M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 357 (1994); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531-45 (4th ed. 1990); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 644-51 (1998). My reference to "prompt, adequate, and effective compensation" as an international practice is not intended to be a claim that this standard represents customary international law. Guzman argues persuasively that the appearance of this standard in bilateral investment treaties does not produce a rule of customary international law because of the lack of *opinio juris* on the part of developing States. Guzman, *supra*, at 684-88.

<sup>111</sup> See WORLD BANK GUIDELINES, art. IV.3, *supra* note 80, at 161 (defining adequate compensation as "fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred"); MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. III(2), *reprinted in* Lewis, *supra* note 87, at 138 (providing the same); GERMAN INVESTMENT TREATY, *supra* note 87, art. 4(2) (providing the same); NAFTA, *supra* note 87, art. 1110(2) (providing the same); MAI, *supra* note 81, § IV, art. 2.3 (providing the same).

delay.<sup>112</sup> Effective compensation typically means that payment should be fully realizable and freely transferable.<sup>113</sup>

The Revised Investment Law provides for "fair market value" compensation, as required by international standards, but it does not provide a definition for this term. Therefore, it is ambiguous whether fair market value means what it means in international agreements and guidelines on investment. Perhaps the PNA will use the implementing Regulations to provide a precise meaning for "fair market value." Article 11 of the Revised Investment Law provides for the free transferability of "compensation payments for expropriations," which conforms to part of the standard for effective compensation in international investment agreements and guidelines. The Revised Investment Law does not explicitly provide for prompt and fully realizable compensation. The absence of these fundamental elements of international standards on expropriation should be a source of concern for investors. The PNA responded to the criticisms that the Original Investment Law lacked any standards for compensation for expropriated investments,<sup>114</sup> but it proved unwilling in the Revised Investment Law to provide all of what is commonplace on the standard of compensation in international investment agreements and guidelines.

Not included in the Revised Investment Law, but important in international standards and practices, is protection for investors against unilateral termination of contracts by governments for non-commercial reasons. The World Bank Guidelines provide, for example, that the standards governing expropriations should also regulate governmental termi-

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<sup>112</sup> See WORLD BANK GUIDELINES, art. IV.8, *supra* note 80, at 163 (defining prompt compensation to be compensation "paid without delay"; MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. III(2), *reprinted in* Lewis, *supra* note 87, at 138 (providing for payment without delay); GERMAN INVESTMENT TREATY, *supra* note 87, art. 4(2) (providing the same); NAFTA, *supra* note 87, art. 1110(3) (providing the same); MAI, *supra* note 81, § IV, art. 2.2 (providing the same).

<sup>113</sup> See WORLD BANK GUIDELINES, art. IV.7, *supra* note 80, at 163 (defining effective compensation); MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. III(2), *reprinted in* Lewis, *supra* note 87, at 138 (providing for fully realizable and freely transferable compensation payments); GERMAN INVESTMENT TREATY, *supra* note 87, art. 4(2) (providing that compensation payments be "effectively realizable and freely transferable"); NAFTA, *supra* note 87, arts. 1110(3), 1110(6) (providing that compensation payments be fully realizable and freely transferable); MAI, *supra* note 81, § IV, art. 2.4 (providing the same).

<sup>114</sup> See *The Legal Framework for Business in the West Bank and Gaza Strip*, *supra* note 50, ¶ 10 (describing comments of Joseph Battat of the World Bank that the Original Investment Law makes "no mention of compensation"); Fidler, *supra* note 6, at 571 ("The Investment Law is silent as to the standard that would govern the compensation of an investor subject to expropriation").

nations of contracts with investors for non-commercial reasons.<sup>115</sup> Article 11 of the Revised Investment Law provides that compensation payments for "unilateral termination of contracts for non-commercial reasons" are freely transferable,<sup>116</sup> but nowhere does the Law provide standards for non-commercial termination of investor contracts and for compensation for such terminations.

### 3. Cancellation of Real Property Permits

Article 10 of the Revised Investment Law provides that no agency of the PNA or other governmental entity may cancel permits issued in connection with real property unless the Agency is consulted.<sup>117</sup> In addition, real property permits held by investors "may not be canceled unless for legal reasons or public purpose on the basis of non-discrimination."<sup>118</sup> Article 10 also provides that "[t]he injured Investor shall, through the judicial system, have the right to request compensation for losses incurred as a result of the cancellation."<sup>119</sup> Article 10 directly addresses one of the most problematic legal concerns in the Palestinian Territories—the unsettled legal regime for real property.<sup>120</sup> Positively, Article 10 extends the non-discrimination principle for Investors into the area of treatment of real property claims. The explicit inclusion of the non-discrimination principle in Article 10 underscores the prevailing confusion about non-discrimination in the Revised Investment Law. On the one hand, its inclusion in Article 10 could be used to reinforce the notion that the general non-discrimination principle in Article 7(A) applies widely throughout the Revised Investment Law. On the other hand, the explicit inclusion of the non-discrimination protection in Article 10 accentuates the confusion over the scope of Article 7(A) and raises the question why an explicit inclusion of the non-discrimination principle does not appear in the provisions on expropriation.

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<sup>115</sup> WORLD BANK GUIDELINES, art. IV.11, *supra* note 80, at 163-64 (applying standards on expropriation to unilateral termination of contracts for non-commercial reasons).

<sup>116</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 11.

<sup>117</sup> See *id.* art. 10. The Agency "may give its opinion within seven days from the date of the request." *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See *The Legal Framework for Business in the West Bank and Gaza Strip*, *supra* note 50, ¶¶ 2-5 (describing comments of John MacFarlane of Birzeit University Law Center on need for legal reform concerning land ownership); Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israel-Palestinian Settlement*, 89 AM. J. INT'L L. 295 (1995).

Another problem with Article 10 is that it limits the Investor's recourse to compensation "through the judicial system" and seemingly cuts off recourse to independent arbitration granted as a general matter in Article 41(B)(1) of the Revised Investment Law.<sup>121</sup> Given Article 10, a dispute over a real property permit between an Investor and any Palestinian governmental authority would be a dispute that relates "to rights and obligation provided for in the Investment Law."<sup>122</sup> Article 10 confines an Investor's recourse for compensation in any such dispute to the Palestinian judicial system. This is not an option likely to garner support from foreign investors given the problems and controversies surrounding the Palestinian judicial system.<sup>123</sup>

#### 4. Repatriation of Financial Resources

Free transferability of capital, profits, and other forms of financial resources are very important to foreign investors. International standards provide for such free transferability in a convertible currency at prevailing market exchange rates, subject only to the operation of certain important public laws, such as bankruptcy law, securities law, criminal law, tax law, and judicial orders and judgements.<sup>124</sup> The Revised Investment Law largely conforms to international standards on the repatriation of financial resources. Article 11's guarantee of free transferability covers all types of financial resources and provides for transferability "at the applicable market currency exchange rates in effect at the time of

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<sup>121</sup> See discussion *infra* Part III.E (analyzing the general dispute settlement provisions of the Revised Investment Law).

<sup>122</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 40.

<sup>123</sup> See Hiram E. Chodosh & Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38 HARV. INT'L L.J. 375, 401-11 (1997) (discussing problems confronting the reform of the Palestinian civil justice system). Concerns about the Palestinian judiciary also appear in the criminal justice context. See *id.* at 411-25; AMNESTY INTERNATIONAL, *supra* note 58, at 27-30 (discussing the disempowerment of the judiciary in criminal cases).

<sup>124</sup> See WORLD BANK GUIDELINES, art. III.6(1), *supra* note 80, at 159 (providing for free transferability of financial resources); MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. V, *reprinted in* Lewis, *supra* note 87, at 140 (providing for free transferability and laying out legal areas under which transfer may be prevented); GERMAN INVESTMENT TREATY, *supra* note 87, art. 5 (providing for free transferability of financial resources); NAFTA, *supra* note 87, arts. 1109(1), 1109(4) (providing for free transferability of financial resources and laying out legal areas under which such transfers may be prevented); MAI, *supra* note 81, § IV, arts. 4.1, 4.6 (providing for free transferability and areas which would prevent transfers).

transfer in a convertible currency acceptable to the Investor."<sup>125</sup> Article 12 allows the PNA to limit repatriation in applying bankruptcy, securities, criminal, tax, and currency transfer laws as well as enforcing injunctions and final judgments of Palestinian courts or arbitral proceedings.<sup>126</sup> The only thing missing from these provisions of the Revised Investment Law that appears in international agreements and guidelines is the principle of non-discrimination in the application of the public laws that might limit repatriation.<sup>127</sup> In addition, the Revised Investment Law does not guarantee investors access to foreign currencies. This is important for foreign investors to conduct business in different jurisdictions as well as to repatriate financial resources.

### 5. Summary on General Guarantees

The Revised Investment Law is disappointing because it raises questions and concerns in connection with the principle of non-discrimination generally and specifically with regards to expropriation. The confusing scope of Article 7(A) will worry foreign investors. In addition, non-discrimination does not appear as a discipline on the power to expropriate, even though international standards apply this discipline. The absence of guarantees for prompt and fully realizable compensation for expropriation in the Revised Investment Law will also concern foreign investors because such absence cuts against international standards. The lack of criteria to regulate unilateral termination of contracts for non-commercial reasons form another point of possible worry for foreign investors. Finally, the provision on real property permits contains ambiguity as to its protective scope and limits the recourse of an investor for compensation to Palestinian courts. While the protections for repatriation of financial resources are improved over what appeared in the Original Investment Law, the PNA's refusal to adopt fully and clearly international standards on non-discrimination, standards for expropriation, and unilateral termination of contracts for non-commercial reasons undermines the potential of the Revised Investment Law to contribute to the legal enabling environment for private sector investment.

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<sup>125</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 11.

<sup>126</sup> *Id.* art. 12.

<sup>127</sup> See, e.g., MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. V(4), *reprinted in* Lewis, *supra* note 87, at 141 (requiring "the equitable, non-discriminatory and good faith application of its laws" limiting repatriation); NAFTA, *supra* note 87, art. 1109(4) (providing for limits on repatriation); MAI, *supra* note 81, § IV, art. 4.6 (limiting repatriation).

### C. Institutional Arrangements

Chapter Three of the Revised Investment Law establishes the Agency and lays out the details of its composition, functions, and powers. The Agency "shall be an autonomous institution of the Authority," is governed by a Board of Directors, and operated under the direction of a Director General.<sup>128</sup>

#### 1. Functions and Powers of the Agency

The basic function of the Agency is to encourage and promote investment in the Palestinian Territories.<sup>129</sup> Thus, the Board of Directors' functions include a number of responsibilities connected with attracting and facilitating investment in the Palestinian Territories.<sup>130</sup> The Revised Investment Law instructs the Board of Directors to make the Agency "a one-stop shop to facilitate all procedures for the Investor concerning the [i]nvestment."<sup>131</sup> In the context of conducting business in the Palestinian Territories, the Agency must act as a facilitator of investment, as envisioned in the Revised Investment Law.

While promotional and facilitative functions are important, foreign investors will be more concerned about the regulatory functions and powers of the Agency. The Original Investment Law contained significant regulatory powers for the Agency, including the power to approve all investments and grant and cancel tax exemptions.<sup>132</sup> A major weakness of the Original Investment Law was the lack of criteria and standards to guide the use of Agency regulatory powers. Thus, the Original Investment Law suffered from a lack of transparency in connection with the exercise of Agency regulatory powers. In addition, the Original Investment Law granted regulatory powers to political bodies, again mak-

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<sup>128</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, arts. 8 (establishing the Palestinian Investment Promotion Agency), 15 (establishing the Agency's Board of Directors), and 18 (establishing the Agency's Director General).

<sup>129</sup> *Id.* art. 3(A).

<sup>130</sup> *See, e.g., id.* arts. 16(1) ("Oversee and evaluate policies"), 16(3) ("Attract Investors to Palestine"), 16(4) ("Advise the [PNA] on Palestinian investment policies"), 16(13) ("Develop a close working relationship with the concerned Palestinian authorities to assure a unified national investment promotion strategy"), 16(16) ("Issue an annual guide for investment opportunities in Palestine").

<sup>131</sup> *Id.* art. 16(18).

<sup>132</sup> *See, e.g.,* LAW ON THE ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 11(1), *translated in* Fidler, *supra* note 6, app. at 606 (powers to approve investments and granting tax exemptions); *id.* art. 19(1), *translated in* Fidler, *supra* note 6, app. at 609 (power to cancel or suspend exemptions under certain conditions).



ing the operation of the Law less than transparent.<sup>133</sup> Because the Revised Investment Law retains a system of granting tax exemptions and incentives, the Agency has regulatory powers. These regulatory functions will be examined below in the section on investment incentives.<sup>134</sup>

An important Agency function that connects to the creation of an enabling environment for private sector investment is its role in (1) modernizing and implementing Palestinian law and international agreements, and (2) ensuring the Agency operates in an effective and transparent manner. The Agency is charged with monitoring Palestinian law and proposing changes to the Council of Ministers with respect to laws or regulations that "restrict, limit, or prejudice any of the rights and guarantees provided in the Investment Law."<sup>135</sup> The Agency must also "[l]ook into developing and modernizing laws related to investment and adopt policies and programs that contribute to providing an environment conducive to investment."<sup>136</sup> The Agency has to assist the PNA "in complying with any investment agreement that the Authority may enter into with another State or international organization."<sup>137</sup> This responsibility would include implementing the agreement between the PNA and the World Bank concerning the Investment Guarantee Fund, administered by the Multilateral Investment Guarantee Agency and established to "provide guarantees in the form of insurance against political risk for private investments in the WBG."<sup>138</sup>

The Agency also has responsibilities to ensure that it operates transparently. Article 21 provides, for example, that the Agency shall appoint independent auditors who have the right to examine all Agency financial records in conducting audits for the Board of Directors.<sup>139</sup> The Board of Directors must also prepare an annual report on the Agency's activities that includes the audited financial statements.<sup>140</sup> Agency staff will be

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<sup>133</sup> See *id.* art. 14, translated in Fidler, *supra* note 6, app. at 608 (making investment in six economic sectors subject to prior approval by the PNA); *id.* art. 19(3), translated in Fidler, *supra* note 6, app. at 609 (giving President of PNA the power to resolve exemption cancellation disputes between the PNA and investors); Fidler, *supra* note 6, at 567-68, 572 (criticizing Articles 14 and 19).

<sup>134</sup> See *infra* Part III.D.

<sup>135</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 16(11).

<sup>136</sup> *Id.* art. 16(15).

<sup>137</sup> *Id.* art. 16(12).

<sup>138</sup> World Bank, *supra* note 55 (describing Investment Guarantee Fund).

<sup>139</sup> See REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 21.

<sup>140</sup> See *id.* art. 16(14). As with the Original Investment Law, these provisions could have been strengthened by requiring the Agency's financial statements to be audited

will be subject to procedures adopted from the Palestinian Civil Servants Law.<sup>141</sup> The Agency is also required to protect all confidential information provided to it by investors.<sup>142</sup>

## 2. Structure and Procedures of the Agency

A major concern with the Original Investment Law's Agency provisions was that they made the Agency vulnerable to PNA politics because of the dominance of PNA ministries on the Board of Directors and the presence of Board members hand-picked by Arafat.<sup>143</sup> PNA ministry representatives still dominate the Agency, accounting for eight of the thirteen seats on the Board of Directors.<sup>144</sup> Five representatives from the private sector will be appointed by the PNA Council of Ministers, upon the recommendation of the Board of Directors.<sup>145</sup> Given the way Arafat dominates the PNA, the Revised Investment Law gives little comfort that it will not be subject to PNA politics. The effect of possible politicization on the Agency depends, however, on the extent of its regulatory powers. The significant regulatory powers of the Agency under the Original Investment Law were a cause of deep concern. If the Agency is now more promotional than regulatory, potential political influence on its operations will concern investors less than politics affecting regulatory action. I return to this point in examining the incentives in the Revised Investment Law.

The almost identical structure of the Agency's Board of Directors in the Original and Revised Investment Laws means that the Revised Investment Law repeats other problems seen in the Original Investment Law. As I argued in connection with the Original Investment Law:

With the interests of so many ministries represented in the deliberations of the Board of Directors, its decision-making process will not be transparent or predictable. The dynamics of the Board of Directors may be such that only forceful direction from the President of the PNA will produce decisions. In such a situation, the real power re-

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according to generally accepted public sector accounting principles. *See* Fidler, *supra* note 6, at 560 (noting possible need for auditing under internationally recognized accounting principles).

<sup>141</sup> *See id.* art. 16(19).

<sup>142</sup> *See id.* arts. 1, 22 (providing a comprehensive definition of confidential information with protection that should appeal to investors).

<sup>143</sup> *See* Fidler, *supra* note 6, at 560.

<sup>144</sup> *See* REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 15.

<sup>145</sup> *See id.* art. 15(3).

sides not in the Investment Agency but in the President's office, opening up even greater potential for politicized decision-making.<sup>146</sup>

To underscore this concern, mention should be made of Article 17(D), which provides that the "deliberations of the Board shall be closed, unless the members agree otherwise."<sup>147</sup> Thus, the process by which the Board of Directors makes decisions will not be transparent, further distancing the Revised Investment Law from the important principle of transparency. Positively, the Revised Investment Law requires that the private sector Board representatives and the Director General act without conflicts of interest in connection with investments under the Agency's jurisdiction.<sup>148</sup>

The Revised Investment Law provides that Board of Directors' decisions are made by majority vote, with the Chairman's vote breaking the tie.<sup>149</sup> The Agency will be funded by regular appropriations from the PNA budget,<sup>150</sup> as well as (1) revenues generated by the Agency's provision of services to Investors; (2) stamp duties paid in the investment process; (3) penalties imposed under the Law; and (4) grants from governments, international organizations, and non-governmental organizations.<sup>151</sup> Most troubling from a foreign investor's point of view are the funding mechanisms involving stamp duties and penalties. While the Revised Investment Law deals with the penalties in the provisions on incentives (see analysis below), it does not define what "stamp duties paid in the investment process" are – which makes this a provision the Agency will have to make clear to investors.

#### *D. Exemptions and Incentives*

Countries often attempt to attract foreign investment with various tax exemptions and incentives. International standards do not require the offering of such tax benefits. International standards prohibit governments from requiring investors to (1) purchase or use products of domestic origin, (2) limit the volume of imported products, and (3) export a certain level of products containing local parts and components in order

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<sup>146</sup> Fidler, *supra* note 6, at 561.

<sup>147</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 17(D).

<sup>148</sup> *See id.*

<sup>149</sup> *See id.* art. 17(C). A quorum of one-third of the membership is required. *See id.* art. 17(A). Note also that the Minister of Economy and Trade is the Chairman of the Board of Directors. *See id.* art. 15(I).

<sup>150</sup> *See id.* art. 20.

<sup>151</sup> *See id.* art. 19.

for the investor to receive certain benefits.<sup>152</sup> The World Bank's experience with investment laws is that "lower effective tax rates are by far more attractive to investment than high tax rates plus incentives."<sup>153</sup> Despite the World Bank's skepticism about tax incentives in investment laws, the Revised Investment Law contains a complicated tax exemption and incentive scheme.<sup>154</sup> This section analyzes critically this complex incentive regime.

### 1. Investment Approval vs. Investment Incentives

The Original Investment Law appeared to require that the Agency not only deal with applications for tax exemptions but also approve investments as a general matter.<sup>155</sup> This aspect of the Original Investment Law was criticized by experts.<sup>156</sup> The Revised Investment Law establishes the principle of free admission, except for investments in the economic industries listed in Article 5, which require pre-approval by the PNA. So investors not investing in Article 5 industries, and who are not interested in tax exemptions or incentives, do not have to seek investment approval from the Agency. This is a positive development from the Original Investment Law because it reduces the scope of the Agency's regulatory powers. The Agency retains regulatory power in connection with granting and canceling tax exemptions and incentives which are the focus of the following sections.

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<sup>152</sup> See, e.g., TRIMS, *supra* note 91, annex (1).

<sup>153</sup> *The Legal Framework for Business in the West Bank and Gaza Strip*, *supra* note 50, ¶ 10 (comment of Joseph Battat of the World Bank); see WORLD BANK GUIDELINES, art. III.9, *supra* note 80, at 160-61 (stating that the World Bank Guidelines do not require States to provide fiscal incentives to foreign investors, and that "[r]easonable and stable tax rates are deemed to provide a better incentive than exemptions followed by uncertain or excessive rates").

<sup>154</sup> The Original Investment Law also contained complicated tax exemption provisions. See Fidler, *supra* note 6, at 562-69 (analyzing tax exemption provisions).

<sup>155</sup> LAW ON THE ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 11(1), translated in Fidler, *supra* note 6, app. at 606 (mentioning "[p]rojects which are approved by the Agency" being granted exemptions).

<sup>156</sup> See *The Legal Framework for Business in the West Bank and Gaza Strip*, *supra* note 50, ¶ 10 (describing the comment of World Bank's Joseph Battat "that the requirement that almost every single investment project needs . . . to be approved is too restrictive"); Fidler, *supra* note 6, at 558 ("What is not clear from the text is whether all foreign investors must submit investment projects for review by the Investment Agency or only those seeking the exemption benefits provided by the Investment Law . . .").

## 2. Basic Structure of the Tax Incentive Regime

In both the Original and Revised Investment Laws, the tax incentive regimes center on exemptions from customs duties and income tax. In the Original Investment Law, the exemptions from customs duties and income tax corresponded to the size of the investment; how many workers it employed; and its economic life. Thus, an investment of more than U.S.\$500,000 that employed at least twenty-five Palestinian workers with a project life of at least ten years was exempt from customs duties and income tax for five years.<sup>157</sup> This approach created all kinds of difficulties.<sup>158</sup> The Revised Investment Law separates custom duties exemptions from income tax incentives, creating two tax benefit regimes instead of one.<sup>159</sup> In addition, the Revised Investment Law gives the Agency discretionary power to grant additional exemptions under certain situations.<sup>160</sup> The following sections of this Article critically analyze these various incentive regimes.

## 3. Exemptions from Customs Duties

Articles 23 and 36 of the Revised Investment Law lay out the regime concerning exemptions from customs duties.<sup>161</sup> Table 1 below summarizes these custom duty exemptions.

TABLE 1: EXEMPTIONS FROM CUSTOMS DUTIES

Category	Tax Exemption	Criteria
Imported fixed assets (Art. 23(A))	Exemption from customs duties for period set by Agency; extension of period possible if nature and size of investment require extension	Agency approval of list of imported fixed assets
Spare parts (Art. 23(B))	Exemption from customs duties for period set by Agency; no extension option provided	(1) Agency approval of list and quantity of spare parts; and (2) value of

<sup>157</sup> LAW ON THE ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 11(1), translated in Fidler, *supra* note 6, app. at 606; see Fidler, *supra* note 6, at 562 (summarizing in a chart the exemption criteria of the Original Investment Law).

<sup>158</sup> See Fidler, *supra* note 6, at 563-64 (analyzing problems with Article 11 of the Original Investment Law).

<sup>159</sup> See REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, arts. 23, 24.

<sup>160</sup> See *id.* arts. 24(D), 25(C), 25(D), 32 (creating discretionary power regarding exceptions and incentives).

<sup>161</sup> See *id.* arts. 23, 36.

		spare parts does not exceed 15% of fixed assets
Imported fixed assets required for enlarging, developing, or upgrading Investment (Art. 23(C))	Exemption from customs duties	Agency determination that fixed assets increased the productive capacity of Investment
Price increase in value of fixed assets (Art. 23(D))	Exemption from customs duties	Price increase must result from rise in prices in country of origin, or as a result of increase in cost of shipping or price of transportation
Furniture (Art. 36(A))	Exemption from customs duties; additional exemptions available once every seven years for furniture purchased for modernization and renovation	Must be imported for use in hotels; additional exemptions subject to requirements that Agency approve list of furniture to be imported and that furniture is used within two years from date list approved
Electrical appliances and electronics (Arts. 36(B)-(D))	Exemption from customs duties; additional exemptions available once every seven years for items purchased for modernization and renovation	Must be imported for tourism or hospital enterprises; additional exemptions subject to requirements that Agency approve list of electrical appliances and electronics to be imported and that are used within two years from date list approved

An initial observation about the customs duties exemptions is that the scope of the term "Investment" affects the application of these exemptions. As the imports that can benefit from the exemptions must relate to Investments, the interpretation of Investments will affect the scope of the customs duties exemptions.

From the foreign investor's perspective, the first concern about this regime for customs duties exemptions is whether the PNA can deliver such exemptions. Under the Economic Protocol, Palestinian import duties are pegged to Israeli tariffs, except in specific circumstances or in connection to specific products. The Economic Protocol does not give the PNA general powers to offer duty-free treatment to all kinds of imported products that may be used in Investments. As Molkner argued, the PNA cannot offer other States reduced tariff rates because the Economic Protocol generally applies Israeli tariffs to Palestinian imports.<sup>162</sup> The Israeli concern about cheaply imported products leaking into the Israeli market from the Palestinian Territories applies to the customs duties exemption scheme in the Revised Investment Law. It is, therefore, unlikely that Israel will be cooperative in effecting this scheme.

The need for Israeli customs cooperation raises a more practical problem: because Palestinian companies still rely almost exclusively on the Israeli trade infrastructure to import and export products, the customs duties exemptions are hostage to Israeli behavior. If border closures and other Israeli obstructionist tactics remain part of the Palestinian economic reality, then Palestinian importers are likely to continue having imports marked as destined for Israel rather than the Palestinian Territories. Marked as such, the imports would receive no customs duty exemptions. Only independent Palestinian ports and airports would allow Palestinian companies to import without concern about Israeli actions.<sup>163</sup> The problem is, however, that even with the existence of such a trade infrastructure, Palestinian import duties are still pegged to Israeli tariffs under the Economic Protocol until a final settlement is reached.

Leaving aside these legal and political problems, the customs duties exemption scheme contains many features that would concern foreign investors. First, the Revised Investment Law sets up a complicated, bureaucratic process that a company has to navigate in order to get fixed asset imports exempt from customs duties. All the exemptions available in Article 23, for example, are subject to Agency approvals and decisions. Article 23(A) provides that the Agency has to approve "the list of fixed assets of the Enterprise" to be imported.<sup>164</sup> No where does the Re-

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<sup>162</sup> See Molkner, *supra* note 37, at 1448.

<sup>163</sup> In the Wye Memorandum, Israel and the Palestinians committed themselves to making progress on the construction and operation of a Palestinian seaport in the Gaza Strip because of "the great importance of the Port of Gaza for the development of the Palestinian economy, and the expansion of Palestinian trade." Wye River Memorandum, *supra* note 1, art. III.4. The two sides also concluded a protocol on the establishment and operation of an international airport in the Gaza Strip. *Id.* art. III.2.

<sup>164</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 23(A).

vised Investment Law explain the procedure for getting lists of fixed asset imports approved. Moreover, it does not provide that such procedure shall be provided in the Regulations.

Second, the Revised Investment Law does not provide for any criteria to regulate the Agency's approvals or decisions in connection with customs duty exemptions. The Agency has the power to approve lists of fixed asset imports,<sup>165</sup> set the period in which the approved goods must be imported,<sup>166</sup> extend exemptions,<sup>167</sup> and determine whether enlargements increase the productive capacity of the Investment.<sup>168</sup> Nothing in the Revised Investment Law disciplines the Agency's exercise of these powers, nor does it state that such disciplines will be found in the Regulations. Thus, the custom duty exemption regime lacks transparency, which will worry foreign investors.

Third, the custom duty exemptions for tourism enterprises and hospitals differ from the exemptions in Article 23 because they are not generally subject to Agency approvals or decisions. Article 36(A) provides, for example, that "[t]he furniture imported for hotels shall be exempt from customs duties."<sup>169</sup> While fixed asset imports of all other enterprises are subject to Agency approval of lists and other decisions affecting the operation of an Investment, hotel Investors face none of these non-transparent, bureaucratic procedures. In addition, hotel Investors also get the same preferential treatment for imports of electronic appliances and other electronic products,<sup>170</sup> as do hospital Investors.<sup>171</sup> While the PNA is trying to boost tourism as an economic development strategy (e.g., the Bethlehem 2000 Project), the preferential treatment for hotel Investors looks like special privileges produced by successful lobbying on the part of the tourist industry because the tourist industry faces none of the approval procedures faced by all other industries. While the special exemptions for hospitals are understandable in terms of efforts to

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<sup>165</sup> See *id.* art. 23(A, B).

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* art. 23(A).

<sup>168</sup> See *id.* art. 23(C).

<sup>169</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 36(A). Hospital Investors are not mentioned in Article 36(A), but furniture imports for hospitals are eligible for "additional exemptions from customs duties at least once every seven years." *Id.* art. 36(D).

<sup>170</sup> See *id.* art. 36(B).

<sup>171</sup> See *id.* art. 36(C).



improve health in the Palestinian Territories,<sup>172</sup> the customs duties exemptions do not include pharmaceuticals and other non-electronic medical items important to modern health care systems.

#### 4. Income Tax Incentives

The Revised Investment Law constructs a regime under which Enterprises in which Investment are made can receive income tax incentives. Table 2 below summarizes these income tax incentives.

TABLE 2: INCOME TAX INCENTIVES

Investment Size/Type	Income Tax Incentive	Criteria
Investment between U.S. \$100,000 and U.S.\$1,000,000 (Art. 24(A))	(1) Income tax exemption for 5 years from commencement of production, and (2) payment of 10% income tax for 8 years	(1) Investor must submit to Agency information as provided in Regulations; and (2) if Agency does not deny confirmation of incentives with 30 days, then Enterprise gets the incentives
Investment between U.S.\$1,000,000 and U.S.\$5,000,000 (Art. 24(B))	(1) Income tax exemption for 5 years after commencement of production, and (2) payment of 10% income tax for 12 years	(1) Investor must submit to Agency information as provided in Regulations; and (2) if Agency does not deny confirmation of incentives with 30 days, then Enterprise gets the incentives
Investment exceeding U.S.\$5,000,000 (Art. 24(C))	(1) Income tax exemption for 5 years after commencement of production, and (2) payment of 10% income tax for 16 years	(1) Investor must submit to Agency information as provided in Regulations; and (2) if Agency does not deny confirmation of incentives with 30 days, then Enterprise gets the incentives

<sup>172</sup> See, e.g., *The Ministry of Health's Financial Crisis*, PALESTINE ECON. PULSE, Sept.-Oct. 1998, at 6 (reporting on grave problems confronting the Palestinian health system).

Enlargements of Existing Enterprises (Art. 28)	Payment of 10% income tax on enlargements from date of commencement of production of enlargements	(1) Investor must submit to Agency information as provided in Regulations; (2) if Agency does not deny confirmation of incentives within 30 days, then Enterprise gets the incentives; and (3) Board of Directors of Enterprise must approve enlargement
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The first point to mention about the income tax incentives concerns the scope of the term "Investment." As discussed earlier, Investment supports a broad and narrow interpretation in the Revised Investment Law. If the broad interpretation applies, then a passive equity investment in an Enterprise can trigger income tax incentives for the entire Enterprise. It is unlikely that the PNA wanted to include passive equity or debt expenditures as triggering investments for income tax incentives. The narrow interpretation of Investment, centering on monetary investments in fixed capital assets, would appropriately focus the income tax incentives on those Enterprises increasing or improving productive capacity. The income tax incentives underscore the need for more clarity in the scope of the term Investment.

Like the exemptions from customs duties, the income tax incentive provisions set up a bureaucratic process that is unlikely to appeal to foreign investors. Under Articles 26-27, Investors wishing to benefit from the income tax incentives have to submit information to the Agency (as provided by the Regulations) and follow a procedure to receive confirmation of the income tax incentives from the Incentives Committee (as specified in the Regulations).<sup>173</sup> Without the benefit of such Regulations, it is not possible to state whether the procedures for submitting information and receiving Agency confirmation are transparent. Positively, Article 26 forces the Agency to make its determination whether the Enterprise qualifies for tax incentives on the basis of information submitted by the Investor within thirty days from the date the Investor submits infor-

<sup>173</sup> See REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, arts. 26, 27. Article 1 defines the Incentives Committee as "the committee of the Board of Directors that reviews and evaluates Investor requests for Confirmation of Investment pursuant to this Law" without indicating the membership of this Committee here or elsewhere in the Palestinian Investment Law. *Id.* art. 1.

mation.<sup>174</sup> Agency failure to confirm or deny within such thirty-day period means that the Enterprise automatically gets the tax incentives.<sup>175</sup> Foreign investors will, however, want to know whether the Regulations provide specific and transparent criteria under which the Agency must review applications for income tax incentives.

The income tax incentive provisions in the Revised Investment Law make a distinction between Investments in new Enterprises and Investments in existing Enterprises. Investments in new Enterprises that fall within the terms of Article 24 apparently trigger the income tax incentives for the entire income of such Enterprises because they are new. For Investments in existing Enterprises, Article 28 provides that "[a] nominal 10% income tax rate shall be assessed on enlargements of existing Enterprises" caused by Investments within the scope of Article 24.<sup>176</sup> This provision is ambiguous because it is not clear whether the ten percent income tax rate applies to all the income of the enlarged Enterprise or just the portion of the Enterprise's income generated by the enlarging Investment. The Regulations will have to clarify this important point, but so clarifying will not be easy if the ten percent income tax rate applies only to portions of an enlarged Enterprise's income. A formula will have to be devised and applied, resulting in a possible bureaucratic nightmare.<sup>177</sup>

Article 28 provides a definition for what constitutes an enlargement of an existing Enterprise. This definition will be the basis for Agency review of applications for the ten percent income tax rate under Article 28. This definition of enlargement is confusing because it states that enlargement includes an "increase in stated capital *or* capital injected to acquire fixed assets."<sup>178</sup> The inclusion of an "increase in stated capital" suggests that passive equity investments can trigger income tax incentives for an Enterprise, providing an indication that the broad interpreta-

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<sup>174</sup> See *id.* art. 26.

<sup>175</sup> See *id.* This is a significant improvement over the income tax incentives in the Original Investment Law, under which nothing in the Law "guarantees that when an investor invests a certain amount of money or employs a certain number of people, the investment proposal will be approved." Fidler, *supra* note 6, at 564.

<sup>176</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 28.

<sup>177</sup> Article 28 implies the need to figure out what portion of an enlarged Enterprise's total income is eligible for the 10% tax rate. See *id.* art. 28. Using the definition of Investment as a guide, one approach to figuring out the eligible Enterprise income would be to divide the enlarging Investment by the sum of (1) the enlarging Investment, and (2) the total value of Enterprise fixed assets before the enlarging Investment was made. See *id.* art. 1.

<sup>178</sup> *Id.* art. 28 (emphasis added).

tion of Investment fully applies to the income tax incentive provisions.<sup>179</sup> Further adding to the confusion is the requirement in the definition of enlargement that the Investment be "intended to increase the productive capacity of the Investment be it goods, services, or manufacturing and increase it from previous levels of imports or for the purposes of a new line of production or service or activity."<sup>180</sup> It is not clear whether the enlarging Investment must merely be intended to increase productive capacity or must actually do so. What criteria the Agency will use in evaluating whether an enlarging Investment is intended to, or actually increases, productive capacity are not provided by the Revised Investment Law, nor is there any indication the Regulations will provide such criteria. Transparency suffers again. The meaning of "and increase it from previous levels of imports" is not clear. Moreover, it is not clear why the income tax incentive in Article 28 should be linked at all to "previous levels of imports."

### 5. Discretionary Exemptions and Incentives

The Revised Investment Law also contains a number of provisions that give the PNA, including the Agency, discretionary powers to grant exemptions, incentives, and preferential treatment. Table 3 below summarizes these discretionary powers. Unfortunately, the Revised Investment Law repeats the mistake of including these types of discretionary powers which were criticized for appearing in the Original Investment Law.<sup>181</sup>

TABLE 3: DISCRETIONARY EXEMPTIONS AND INCENTIVES

Category	Exemption or Incentive	Criteria
Any special Investment in type and capital (Art. 24(D))	(1) Income tax exemption for 5 years from commencement of production, and (2) payment of 10% income tax for 20 additional years	(1) Agency must recommend special Investment to Council of Ministers, and (2) Council of Ministers must approve

<sup>179</sup> See *id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Fidler, *supra* note 6, at 564-66, 594 (noting problems with broad discretionary powers).

Any Investment enjoying tax exemptions and incentives (Art. 25(A))	Extension of income tax exemption period up to a maximum of 5 additional years	(1) Agency must recommend extension to Council of Ministers, (2) Council of Ministers must approve, and (3) extension depends on nature and location of Enterprise, increase in exports, creation of job opportunities, and advancement of development
Any Investment enjoying tax exemptions and incentives (Art. 25(C))	Extension of income tax exemption for 2 additional years	If Agency determines that local input in Enterprise's equipment, machines, and fixtures exceeds 60%
Any Investment by Palestinian national (Art. 25(D))	Preferential treatment or special guarantees or incentives	Granted by PNA
Enterprises engaged in export (Art. 32)	Additional exemptions for not more than three years	Agency may grant if Enterprise exports 30% of total output

The biggest problem with these discretionary powers is that they are not transparent because their exercise is not mandatory. For example, the Agency is not required to grant additional exemptions to an Enterprise that exports ninety percent of its total output. In three of the five categories listed in Table 3 above, the exercise of the discretionary powers involves political bodies – either the Council of Ministers or the PNA. Not only does the Revised Investment Law repeat the mistakes made in the Original Investment Law concerning discretionary powers, but it also creates *more* categories in which the PNA can exercise discretionary powers.<sup>182</sup>

Other problems plague these discretionary provisions. First, the confusion surrounding the scope of the term Investment affects the read-

<sup>182</sup> The Original Investment Law had three areas in which such discretionary powers could be exercised. See Fidler, *supra* note 6, at 564-66 (analyzing the three discretionary areas). As Table 3 points out, the Revised Investment Law creates five areas in which discretionary powers can be exercised.

ing of these discretionary provisions. Second, the amount of discretion in some of the provisions is startling. Article 24(D) allows, for example, the Council of Ministers to grant, upon Agency recommendation, a five-year income tax exemption and a twenty-year period of ten percent income tax to an Enterprise in which "[a]ny special Investment in type and capital" is made.<sup>183</sup> The Revised Investment Law provides no criteria to clarify what kinds or size of Investments might qualify for such tax incentives, nor does it state that such criteria will appear in the Regulations. Even when the Revised Investment Law provides some criteria, much is left to the discretion of the PNA. Article 25(A) provides, for example, that the Council of Ministers, upon recommendation from the Agency, may extend tax exemption periods up to a maximum of five years "depending on the nature and location of the Enterprise, increase in exports, creation of job opportunities and advancement of development."<sup>184</sup> These criteria are very general, and do not appear to be intended as an exclusive list that the Council of Ministers has to consider.

Third, the power to grant Palestinian nationals who are Investors "preferential treatment" or "special guarantees or incentives"<sup>185</sup> fundamentally violates the national treatment principle, a cornerstone of a non-discriminatory policy towards private sector development. In addition, this discretionary authority is disciplined by no criteria other than that it has to be exercised in favor of Palestinian nationals.

Fourth, Article 25(C) might be a trade-related investment measure proscribed in TRIMS. TRIMS states that making the purchase or use by an enterprise of products of domestic origin or from domestic sources in order to gain an advantage violates the national treatment principle.<sup>186</sup> Article 25(C) requires Enterprises to have over sixty percent local input in their equipment, machines, and fixtures to qualify for an additional two-year income tax exemption.<sup>187</sup> Under the international standard set by TRIMS, Article 25(C) violates the national treatment principle.

Fifth, Article 32 arguably violates the standards set by TRIMS as well. TRIMS prohibits the use of quantitative restrictions on trade, including the exportation of a certain volume of products in order to obtain an advantage.<sup>188</sup> Article 32 allows the Agency to grant "additional ex-

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<sup>183</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 24(D).

<sup>184</sup> *Id.* art. 25(A).

<sup>185</sup> *Id.* art. 25(D).

<sup>186</sup> TRIMS, *supra* note 91, art. 2, annex (1).

<sup>187</sup> See REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 25(C).

<sup>188</sup> TRIMS, *supra* note 91, art. 2, annex (1).

emptions" to export Enterprises provided that they export not less than thirty percent of their total output.<sup>189</sup>

Sixth, leaving aside provisions that possibly violate international standards found in TRIMS, Articles 25(C) and 32 are not transparent. The manner in which the Agency will determine whether an Enterprise has over sixty percent of its equipment, machines, and fixtures from local input is not provided. In terms of the export incentive, the Revised Investment Law does not detail how the Agency will determine whether an Enterprise is exporting thirty percent of its total output. Furthermore, the Revised Investment Law does not state that the criteria for the local input and export related incentives will be spelled out in the Regulations.

Seventh, the Revised Investment Law does not provide any guidance on how Investors are to apply for discretionary exemptions or incentives, and it does not leave the establishment of these procedures to the Regulations. The Agency will play a central role in these discretionary grants, but an Investor will want to know what information has to be submitted and how much time the Agency or other PNA body has to make a decision. The Revised Investment Law contains no guidance on these important procedural issues.

## 6. Modifications of Incentives

The Revised Investment Law contains two provisions that relate to modifications of incentives granted under the Law. First, Article 25(B) states that the Council of Ministers may limit the "investment period for Enterprises operating in the industrial zones, and areas that are remote or under threat of settlement."<sup>190</sup> This provision probably means that the Council of Ministers has the discretionary power to shorten the period in which income tax incentives granted under Articles 24 or 28 can be enjoyed by Investors. Only Investments made in industrial zones, remote areas, or areas under threat of settlement could have income tax incentives modified by the Council of Ministers under Article 25(B).

Second, Article 34 provides Enterprises enjoying customs duty exemptions or income tax incentives with the choice of keeping existing exemptions or incentives, or opting to benefit from more favorable exemptions or incentives promulgated by the PNA.<sup>191</sup> This provision prevents the PNA from enacting and then retroactively applying less desirable exemptions or incentives against existing Enterprises.

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<sup>189</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 32.

<sup>190</sup> *Id.* art. 25(B).

<sup>191</sup> *Id.* art. 34.

## 7. Transfers and Incentives

Investors want to have as much freedom to operate their investments as possible, including freedom to transfer assets or even sell the entire company. Thus, whether the Revised Investment Law interferes with such freedom will be an important point for foreign investors. The Original Investment Law suffered from very restrictive provisions on the transfer of assets of an Enterprise enjoying incentives.<sup>192</sup> The Revised Investment Law allows such an Enterprise to be "transferred freely to a new owner in its entirety; provided that the new owner continues to operate the Enterprise as a going concern."<sup>193</sup> The new owner benefits "from the Incentives as long as the new owner continues to operate the Enterprise as a going concern."<sup>194</sup> If an Enterprise that enjoys benefits under the Revised Investment Law is restructured through mergers or joint ventures, then it continues to enjoy such benefits, but "such restructuring shall not result in any new exemptions from taxation."<sup>195</sup>

Article 39 addresses sales of fixed assets of Enterprises enjoying benefits under the Revised Investment Law, and its provisions are confusing and worrying. Article 39 treats sales of fixed assets by an Enterprise enjoying benefits restrictively if the sales are made to another Enterprise that also enjoys benefits under the Revised Investment Law. Article 39(A) provides that the "Investor may sell the fixed assets that are exempt or assign them to another Investor enjoying the benefits of this Law provided that the approval of the Agency is obtained."<sup>196</sup> The need for Agency approval of fixed asset sales in this situation is not clear, and foreign investors will see this as an unnecessary restriction on the freedom of business operations. Also, forcing the Agency to vet fixed asset sales from one Investor to another seems like a bureaucratic waste of time and resources. Such vetting is not necessary because if an Investor buys fixed assets from another Investor, the purchase has to meet the conditions of Articles 24 and 28 to receive income tax incentives.

Article 39(B) does not impose similar restrictions on sales of fixed assets from an Investor to a company not enjoying exemptions or incen-

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<sup>192</sup> See *The Legal Framework for Business in the West Bank and Gaza Strip*, *supra* note 50, ¶ 10 (describing comments of Joseph Battat of the World Bank on provisions restricting sale of assets); Fidler, *supra* note 6, at 569 (analyzing provisions on sale of assets).

<sup>193</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 30(A).

<sup>194</sup> *Id.* art. 30(B).

<sup>195</sup> *Id.* art. 31.

<sup>196</sup> *Id.* art. 39(A).



tives under the Revised Investment Law.<sup>197</sup> The selling Investor need only notify the Agency, and the seller and buyer have to pay all relevant sales taxes and fees.<sup>198</sup> While less restrictive than Article 39(A), it is still not clear why the Agency has to be notified of such sales. For example, the Revised Investment Law does not require Enterprises enjoying benefits under Article 24 to maintain certain amounts of fixed assets to continue to receive the same income tax incentives. The notification requirement suggests that the Agency may have the power to change the benefits an Enterprise enjoys after fixed asset sales, but the Revised Investment Law does not provide for such a power explicitly, raising transparency concerns again.

### 8. Cancellation or Alteration of Exemptions and Incentives

The Revised Investment Law gives the Agency the power to cancel the exemptions from customs duties and income tax incentives when (1) the Investor knowingly supplied the Agency with false information that was material to the Agency decision in question, or withheld material information from the Agency;<sup>199</sup> (2) the Enterprise enjoying benefits sells or uses "exempt fixed assets . . . for an unauthorized purpose;"<sup>200</sup> and (3) the Investor otherwise commits fraud on the Agency.<sup>201</sup> Of these three grounds for cancellation, the most ambiguous is the punishment for selling or using "exempt fixed assets . . . for an unauthorized purpose." The exact meaning of this provision is unclear, thereby creating a transparency problem. Perhaps it simply means for an "illegal purpose," as in importing machinery ostensibly to make furniture that is used to make bombs or other weapons. More precision is needed to clarify the concept of "unauthorized purpose," which could perhaps be provided in the Regulations.

Another concern with the cancellation provisions is that only Article 33(A) states that the procedure for canceling benefits shall be specified in the Regulations.<sup>202</sup> In addition, Article 33(C) states that an Investor may appeal a cancellation decision "under the procedures specified in the

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<sup>197</sup> See *id.* art. 39(B).

<sup>198</sup> See PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 39(B).

<sup>199</sup> *Id.* art. 33(A).

<sup>200</sup> *Id.* art. 37. Article 37 does not actually provide for cancellation of benefits; it requires the Enterprise to pay all customs duties and taxes owed, but it is implicit in Article 37 that the benefits are, therefore, cancelled.

<sup>201</sup> *Id.* art. 42.

<sup>202</sup> *Id.* art. 33(A).

Regulations.”<sup>203</sup> Article 16(17) also provides for an Investor right to appeal cancellation decisions.<sup>204</sup> Such cancellation and appeal procedures are important for due process and transparency reasons. Neither Article 37 nor Article 42, however, contain references that the Regulations will provide procedural safeguards in the event of cancellation of benefits under these articles. Article 42 states that the Agency may at any time “immediately terminate all approvals granted to the Enterprise.”<sup>205</sup> Perhaps Article 16(17) applies to all incentive termination provisions in the Revised Investment Law; but, as drafted, the ambiguity on this point would worry foreign investors. All cancellation powers of the PNA should be subject to transparent procedural requirements, and the Investor should in all cases have recourse to appeal cancellation decisions.

Article 45 of the Revised Investment Law contains penalties that apply to Investors that knowingly supply false information to the PNA in connection with Investments. Such Investors will be fined not less than 2000 Jordanian dinars, and “all exemptions and incentives shall be retroactively withdrawn.”<sup>206</sup> Thus, depending on how long or how extensively the Investor’s Enterprise enjoyed exemptions from customs duties or income tax incentives, the financial penalties could be enormous when payments of back customs duties and income taxes are considered. Such retroactive penalties make having a transparent and fair cancellation process for all cancellation provisions in the Revised Investment Law imperative from the investor’s perspective.

### *E. Dispute Settlement*

A great weakness of the Original Investment Law was its dispute settlement provisions. Cancellation of incentives could only be appealed to the President of the PNA, an overtly political decision maker.<sup>207</sup> In addition, the Original Investment Law provided foreign investors with no recourse to international arbitration of disputes with the PNA.<sup>208</sup> Making

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<sup>203</sup> PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 33(C).

<sup>204</sup> *See id.* art. 16(17).

<sup>205</sup> *Id.* art. 42.

<sup>206</sup> *Id.* art. 45.

<sup>207</sup> *See* LAW ON ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 19(3), translated in Fidler, *supra* note 6, at 609. *See The Legal Framework for Business in the West Bank and Gaza Strip*, *supra* note 50, ¶ 10 (stating that Joseph Battat of the World Bank criticized this aspect); Fidler, *supra* note 6, at 573 (criticizing Article 19.3 of Original Investment Law).

<sup>208</sup> LAW ON THE ENCOURAGEMENT OF INVESTMENT (1995) (Palestine), art. 20, translated in Fidler, *supra* note 6, app. at 609-10. *See The Legal Framework for Business*

international arbitration an option for foreign investors is an international standard for the protection of foreign investment.<sup>209</sup> The Revised Investment Law follows this standard by providing that, in a dispute between an Investor and the PNA that relates "to rights and obligations provided for in the Investment Law,"<sup>210</sup> "either party shall have the right to take the dispute to: . . . binding, independent arbitration as provided in the Regulations."<sup>211</sup> What the Regulations make available to investors will, of course, be critical to the PNA making the right to international arbitration an effective right. The Regulations will have to provide for what happens if the PNA wants Palestinian courts to deal with the dispute, but the Investor prefers arbitration. International standards favor allowing the Investor's choice to govern, but what the Regulations will propose is still unclear.

While the dispute settlement provisions of the Revised Investment Law are a significant improvement over the provisions in the Original Investment Law, serious concerns still exist. A narrow definition of Investment would mean that many types of investments would not, according to Article 40 of the Revised Investment Law, "relate to rights and obligations provided for in the Investment Law." Similarly, a narrow application of the non-discrimination principle would mean that a discriminatory expropriation would not violate rights and obligations under the Revised Investment Law. The scope of the dispute settlement provisions only extend as far as the rights and obligations provided for in the Revised Investment Law, and this should be a source of concern for foreign investors.

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*in the West Bank and Gaza Strip*, *supra* note 50, ¶ 10 (stating that Joseph Battat of the World Bank criticized the lack of international arbitration in the Original Investment Law); Fidler, *supra* note 6, at 573 (discussing lack of international arbitration option in Original Investment Law).

<sup>209</sup> See WORLD BANK GUIDELINES, art. V(1), *supra* note 80, at 164 (dispute settlement mechanisms include "binding independent arbitration"); MODEL UNITED STATES BILATERAL INVESTMENT TREATY, art. IX, *reprinted in* Lewis, *supra* note 87, at 143 (providing for international arbitration at the option of the investor); GERMAN INVESTMENT TREATY, *supra* note 87, art. 10(2) (allowing international arbitration at request of either party); NAFTA, *supra* note 87, art. 1120 (providing for investor submission of claim to arbitration); MAI, *supra* note 81, § V.D, art. 2 (c) (allowing investor to choose to settle the dispute by arbitration).

<sup>210</sup> REVISED PALESTINIAN INVESTMENT LAW, *supra* note 5, art. 40.

<sup>211</sup> *Id.* art. 41(B)(1).

## IV. INTERPRETING A DISAPPOINTING REVISION

Part III's analysis of the Revised Investment Law demonstrates that the PNA's revision of the Original Investment Law is disappointing when compared to international standards and practices in protecting foreign investment. While some significant improvements have been made, as in the dispute settlement context, the failure to make progress in other areas not only is manifest but also undermines the improvements made, as suggested by analysis of the dispute settlement provisions. As I argued in reviewing the Original Investment Law, "[i]t is disturbing that the Investment Law fails to meet current international standards and practices, given the desperate need for foreign investment in the Palestinian Territories."<sup>212</sup> The confusing definition of Investment, the confusing application of the non-discrimination principle, the failure to adopt fully international standards on expropriation, the continued presence of broad discretionary powers, the continued lack of transparency, the continued involvement of explicitly political bodies in investment decisions, the continued restrictions on assets sales, and the potentially narrow base for the improved dispute settlement provisions, and other problems analyzed above are even more disappointing because they are embedded in the Revised Investment Law after a two-year process of technical advice and assistance from the World Bank and the United Nations Development Programme. Incredibly, the Revised Investment Law is in some respects worse than the Original Investment Law, in that it confuses the scope of the principle of non-discrimination and the expansion of the areas in which the PNA can exercise discretionary incentive powers.

The PNA has for the second time rejected many international standards and practices on foreign investment protection and opted for provisions that will do little to boost foreign investor confidence in the PNA or the Palestinian Territories as an investment location. As with the Original Investment Law, creating a modern, effective regime for private sector investment through the Revised Investment Law "was in the hands of the Palestinians themselves, and they had an opportunity to demonstrate to the world that they understood the importance of foreign direct investment to the achievement of peace and Palestinian autonomy."<sup>213</sup> Again, the PNA mishandled this opportunity, which may have been its last in the eyes of many foreign investors.

The disappointing Revised Investment Law raises deeper questions about the nature of the reform of Palestinian law. Two possible interpretations of the process that produced the Revised Investment Law diverge

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<sup>212</sup> Fidler, *supra* note 6, at 594.

<sup>213</sup> Fidler, *supra* note 50, at 23 (commenting on Original Investment Law).

dramatically and tell very different stories about Palestinian law reform. The harsh interpretation focuses on the question from a philosophical angle, while the more lenient stance centers on more pragmatic problems facing the reform of Palestinian laws.

### *A. A Rejection of Liberal Thinking?*

The philosophically oriented critique of the Revised Investment Law would argue that the continued refusal of the PNA to adopt clearly and fully international standards and practices on the protection of foreign investment suggests that political opposition to these standards and practices exists. Perhaps the Revised Investment Law reveals within the PNA deep opposition to the liberal conception of economic development embedded in international standards and practices. Vandevelde argues that the international investment regime developed largely through bilateral investment treaties is liberal in nature because this regime, and the recent shift towards it, is "driven by a perception that private investment would promote economic development."<sup>214</sup> The perceived importance of private investment to Palestinian economic development likewise flows from liberal economic thinking. In fact, the entire Oslo strategy for Palestinian economic development emerges directly out of liberal philosophy. In analyzing the Original Investment Law, I wrote:

The case for Palestinian economic development made by the World Bank and the United States carries with it the assumptions and objectives of liberal economic thought. The influence of liberal economic thinking can be found at four levels. First, the concern that individual Palestinians need to see that peace brings prosperity ties into the liberal economic tenet, famously expressed by Montesquieu, of *doux commerce*, which holds that commerce tempers human passions and channels them into productive, peaceful endeavors . . . . Economic development is expected to dissipate any discontent among Palestinians, discontent

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<sup>214</sup> Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 390 (1998) [hereinafter Vandevelde, *Sustainable Liberalism*]; see also Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 506 (1998) (arguing that bilateral investment treaties "contribute to the construction of a liberal international investment regime") [hereinafter Vandevelde, *Investment Liberalization and Economic Development*]; Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 621 (1998) (stating that "[t]he massive and sudden proliferation of bilateral investment treaties . . . appears to reflect the triumph of liberal economics in the sphere of international investment").

that would otherwise fester and encourage Palestinians to embrace the ideas of radicals and extremists opposed to the peace process. Second, the emphasis in economic development plans on private investment and market forces demonstrates that the objective is the creation of a capitalist economy in the Palestinian Territories . . . . Third, the plans to promote Palestinian economic development by integrating Palestinians into regional and global markets bear the imprint of the liberal belief that economic interdependence between peoples and states promotes peaceful international relations . . . . Fourth, the liberal economic theory running throughout the strategy for Palestinian economic development has consequences for Palestinian political development because individual freedoms necessary to make *doux commerce*, the invisible hand, and peace through free trade work will require substantial political freedoms, like democracy.<sup>215</sup>

The political problems with the peace process have wrecked this tidy liberal vision for the Palestinians, but the Revised Investment Law may suggest that the PNA does not ascribe to the liberal tenets underlying international standards on foreign investment and the entire Oslo economic development strategy.

In this respect, the PNA is not different from many governments of developing countries. Vandeveldel observes that, in the area of protecting foreign investment, “[f]ew if any developing states have embraced liberalization as an end in itself. They are adherents to the liberal faith only to the extent that the practice of their faith leads to economic salvation.”<sup>216</sup> Guzman’s analysis of developing countries as a group rejecting the liberal standard of compensation for expropriation and developing countries individually accepting the standard in bilateral investment treaties (BITs) also suggests a lack of commitment by developing States to liberalism.<sup>217</sup> The PNA’s reluctance to adopt fully and clearly international standards on foreign investment might be analogized to the refusal by a developing country to sign bilateral investment treaties. Vandeveldel argues that BITs require governments to take certain actions that “are a partial, but indispensable part, of the liberalization of a state’s investment policy.”<sup>218</sup> He further observes that “[i]f a state is unwilling to make the commitment to liberalization embodied in a BIT, . . . then in-

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<sup>215</sup> Fidler, *supra* note 6, at 534-35 n.18 (citations omitted).

<sup>216</sup> Vandeveldel, *Sustainable Liberalism*, *supra* note 214, at 390.

<sup>217</sup> See generally Guzman, *supra* note 110.

<sup>218</sup> Vandeveldel, *Investment Liberalization and Economic Development*, *supra* note 214, at 525.

vestors may well ask how serious that state's commitment to liberalization is."<sup>219</sup> The Revised Investment Law invites the same questions about the seriousness of the PNA's commitment to economic liberalization.

The Revised Investment Law reveals, however, perhaps a deeper opposition to liberal philosophy in the PNA because it has not fully or clearly included in its investment law what most developing States accept in BITs. The history of the Palestinian investment law might make us wonder about "the propriety of using liberal thought as the foundation for developing the economy of a people with no history or experience with free market capitalism or liberal democracy."<sup>220</sup> The politics of the peace process and the politics of the PNA may have shattered the liberal vision of Palestinian economic development constructed in the Oslo process.

### *B. A Pragmatic Perspective*

A more lenient interpretation of the Revised Investment Law rejects the idea that the PNA is illiberal philosophically and emphasizes the pragmatic difficulties involved in law reform efforts in new governments in transition to new forms of politics, economics, and culture. As Thomas Carothers argued in *Foreign Affairs*, rule-of-law reform efforts in many regions of the world are experiencing difficulties that need to be appreciated.<sup>221</sup> The expectations of outsiders for a seamless transition to modern legal codes and institutions by transition states have not been fulfilled. Expectations of the same kind for Palestinian law reform are likewise unrealistic. Indeed, the political and economic obstacles confronting the Palestinian transition to democracy and capitalism are in many respects more serious than those facing governments of independent states.

The Revised Investment Law reflects, therefore, not a rejection of liberal philosophy but another step in the overall process of Palestinian law reform. The process may, in fact, be more important than the product in that the PNA acknowledged criticisms of the Original Investment Law, engaged in a process of law reform with international organizations, and promulgated a new law that is, at least in some respects, better than its predecessor. In addition, the implementation of the Revised Investment Law may well remove confusion and ambiguities now present in the raw text, so the process of creating a new legal regime for invest-

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<sup>219</sup> *Id.* at 526.

<sup>220</sup> Fidler, *supra* note 6, at 535 n.18.

<sup>221</sup> See Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 95.

ment is still unfolding. This pragmatic perspective avoids unrealistic expectations and the mistake of jumping to philosophical conclusions without pausing to consider the historical context or the existing political and economic realities on the ground. While the Revised Investment Law may remain in many respects disappointing, comfort and confidence can be taken by looking pragmatically at the long-term process of investment law reform that is still unfolding.

## V. THE REVISED INVESTMENT LAW, ECONOMIC DEVELOPMENT, AND THE PEACE PROCESS

The Revised Investment Law will not significantly improve the prospects for foreign investment in the Palestinian Territories and, thus, does not contribute much to the Palestinian economic development. At the end of the day, however, the provisions in the Palestinian investment law matter less than other problems menacing the economic future of the Palestinian people. In Part V, I briefly examine these daunting obstacles to Palestinian economic development.

### *A. Whither the Peace Process?*

The biggest obstacle to Palestinian economic development is the bitter political conditions of the peace process. While many have wrongly predicted that the peace process was dead, the process remains in a precarious state despite the achievements in the Wye Memorandum. The Palestinian Territories continue to be a powder-keg of frustration and shattered dreams. Rabin's "peace of the brave" has unfortunately become the continuation of hatred and suspicion by other means. As of this writing, it is not clear that the Wye Memorandum fundamentally altered the bitter dynamics of the peace process.

While the Wye Memorandum emphasizes the importance of Palestinian economic development, neither this emphasis nor the ideas contained in its economic section are new. Nothing in the Wye Memorandum suggests that Palestinian economic development now stands on par with Israeli security concerns in the peace process. The deep involvement of the United States in the implementation of the security provisions of the Wye Memorandum might, however, lead to the establishment of more stable security cooperation that will deteriorate less often into Israeli border closures and wreak havoc on the Palestinian economy. American-fostered stabilization of security cooperation might give the Palestinian economy more breathing room than it has had in the tumultuous years since 1993.

In the long run, the Palestinians themselves face internal political problems. The undemocratic leadership of Arafat, the corruption scan-



dals, and the PNA abuses of human rights have shaken the political self-confidence of the Palestinians and their optimism about their identity and future. With no clear political successor, Arafat's health casts a pall over the peace process and Palestinian autonomy. The deeply entrenched social and political position of Hamas raises concerns not only about the impact of this movement on the peace process, but also on the entire fate of the Palestinian people.

In the past, foreign investors looked at the political instability in the peace process and adopted a "wait and see" mentality.<sup>222</sup> Unfortunately, this mentality has now turned into "let's look somewhere else." With competition for foreign investment capital intense among developing countries, foreign investors have plenty of options and do not need to wait for the peace process to arrive at a stable environment for Palestinian economic development.<sup>223</sup>

### *B. Whither the Enabling Environment?*

Another problem weighing against foreign investment in the Palestinian Territories is the continued difficulties the PNA has in creating a proper enabling environment for private sector development. The Revised Investment Law is perhaps the classic example of how the PNA has not done what is considered necessary to reform its law to accommodate businesses in the global era. But even if the PNA had adopted a revised law that conformed to all international standards and practices, the success of this law would remain hostage to the effective reform of Palestinian commercial, trade, and tax laws. The legal reform problems relate directly to the political difficulties within the PNA because Arafat's leadership has not historically operated on the basis of the rule of law. Those concerned about the fate of the Palestinian people's economic destiny can only hope that the Revised Investment Law proves an aberration in the legal reforms needed to create the enabling environment for a globally oriented, market economy.

### *C. Whither Economic Opportunity for Palestinians?*

The economic development strategy forged in the Oslo process and rekindled in the Wye Memorandum envisioned the Palestinian Territories as an export platform for major markets around the world. As Part I of

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<sup>222</sup> *Id.* at 595.

<sup>223</sup> As Gil Feiler put it, "I . . . wish to make the reader aware of the strong competition that the Palestinian Authority faces in attracting foreign investment." *Reevaluation of the Border Industrial Estates Concept* (visited Mar. 5, 1999) <<http://www.ipcri.org/ind.html>>.

this Article observed, many now believe this vision to have, in the words of the *Palestine Economic Pulse*, "faded into oblivion."<sup>224</sup> Today, Palestinians believe that the economic situation portends "a future of Palestinian cantons dependent on Israel rather than an independent, territorially integrated Palestine."<sup>225</sup> Others have more harshly referred to this prospect as the creation of Palestinian Bantustans utterly dependent on Israel economically.<sup>226</sup> The continuation and deepening of this economic dependence will not attract foreign investment to the Palestinian Territories as foreign investors will be wary of the political, social, and economic consequences of Palestinian economic dependence on Israel.

## VI. CONCLUSION

Whether the peace process continues to survive after the Wye Memorandum, no matter how precariously, remains to be seen. The continued lack of foreign investment in the Palestinian Territories is not only a sign of the troubles with the peace process, but it also contributes to these troubles because foreign investment was considered critical for Palestinian economic development. Greater political, legal, economic, and philosophical forces will ultimately control the contribution of the Revised Investment Law to the peace process and the future of the Palestinian people. As promulgated, however, the Revised Investment Law represents a questionable contribution to Palestinian economic development. Its provisions and the context in which they were adopted fail to provide what foreign investors will seek before attempting to build and profit from peace in the Palestinian Territories.

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<sup>224</sup> *The Paris Protocol Gridlock . . . What Next?*, *supra* note 26, at 3.

<sup>225</sup> *The Palestinian Economy: Keeping People in Their Place*, *ECONOMIST*, Sept. 12-18, 1998, at 48, 53.

<sup>226</sup> See Shlomo Avineri, *Sidestepping Democracy*, *FOREIGN AFF.*, July-Aug. 1994, at 12, 13 (continued Palestinian economic dependence on Israel would create a "virtual Bantustan . . . on Israel's doorstep"); see also *The Palestinian Economy: Keeping People in Their Place*, *supra* note 225, at 53 (quoting Azmi Bishara, a Palestinian member of the Israeli parliament, as saying: "Let's be honest, had Gaza been in apartheid South Africa it would been called a homeland").

